

86-643

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER 1986 TERM

SOUGHIK ('SONIA') KAYZAKIAN,

Petitioner,

v.

THOMAS F. KRAJEWSKI, ETC., ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE TRIAL COURT ERRED IN DENYING THE PETITIONER LEAVE TO AMEND HER PLEADINGS UNDER RULE 15 OF THE FEDERAL RULES OF CIVIL PROCEDURE TO INCLUDE OTHER DEFENDANTS AND ALLEGATIONS CONCERNING DISCRIMINATORY AND RETALIATORY ACTS BY THESE DEFENDANTS AND THE RESPONDENTS, IN VIOLATION OF THE PETITIONER'S FIRST AMENDMENT CONSTITUTIONAL RIGHTS.

II.

WHETHER THE TRIAL COURT ERRED IN IMPOSING ONEROUS AND UNREASONABLE TERMS AND CONDITIONS UPON THE PETITIONER UNDER RULE 41(A)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THEN ORDERING A VOLUNTARY DISMISSAL WITH PREJUDICE OF THE INDIGENT PETITIONER'S CIVIL RIGHTS ACTION AGAINST THE RESPONDENTS, AGENTS OF A STATE-OPERATED MENTAL HOSPITAL.



III.

WHETHER THE DISTRICT COURT JUDGE FAILED TO RECUSE FROM THE CASE UNDER 28 U.S.C. 455 AND HIS FAILURE TO BE IMPARTIAL WITH RESPECT TO THE RESPONDENT'S EXPERT WITNESS VIOLATED THE PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL TRIER OF THE FACTS.

IV.

WHETHER THE TRIAL COURT ERRED IN ITS FAILURE TO IMPOSE PROPER CONDITIONS FOR THE PSYCHIATRIC EXAMINATION OF THE PETITIONER BY RESPONDENT'S PSYCHIATRIST AND PSYCHOLOGIST PURSUANT TO RULE 35 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

PARTIES TO THE PROCEEDING

Soughik ('Sonia') Kayzakian

Thomas F. Krajewski, Sued in his individual as well as official capacity, Superintendent, Springfield Hospital Center;

Jonathan D. Book, Sued in his individual as well as official capacity, Clinical Director, Springfield Hospital Center;

Peter T. Pompilo, Sued in his individual capacity;

Irfran S. Esendal, Sued in his individual as well as official capacity, Director, Martin Gross Unit, Springfield Hospital Center;

Reza G. Bassiri, Sued in his individual as well as official capacity, Director, City Division, Springfield Hospital Center;



Deusdedit Jolbitado, Sued in his
individual as well as official
capacity, Chair, Hospital
Privileging Committee, Springfield
Hospital Center;

Philip P. Townsend, Sued in his
individual as well as official
capacity, Personnel Administrator,
Springfield Hospital Center;

Bruce L. Regan, Sued in his
individual as well as official
capacity, Director of Psychiatric
Education and Training, Mental
Hygiene Administration, Department
of Health and Mental Hygiene,



(i)

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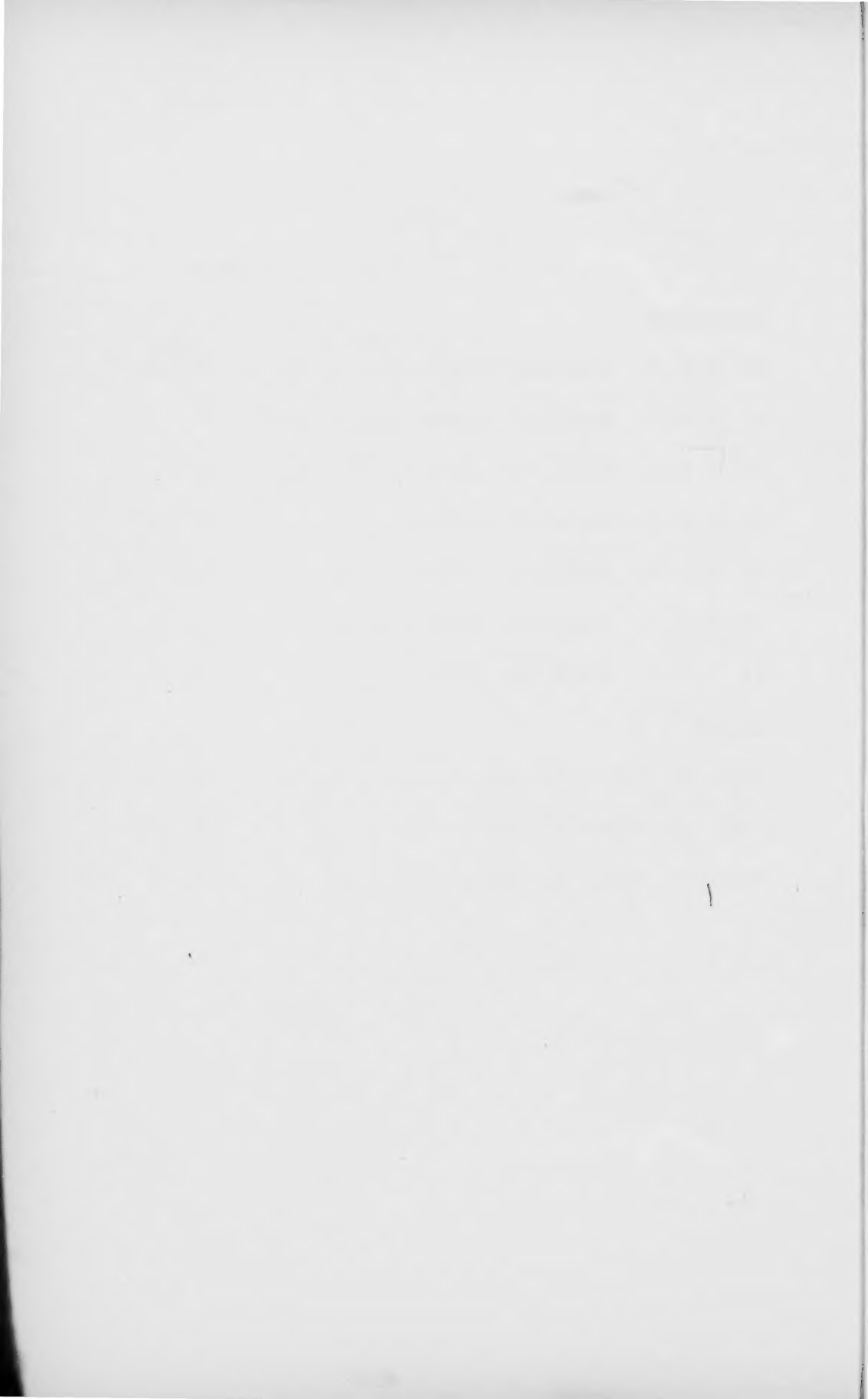
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STATEMENT OF JURISDICTION

On June 2, 1986, the Fourth Circuit Court of Appeals entered judgment affirming the United States District Court's dismissal of the Petitioner's complaint with prejudice. The Petitioner moved for a rehearing, which was denied on July 22, 1986. The statutory provision which confers on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. Section 1254. The basis of the Federal District Court's jurisdiction of the Petitioner's claim was 42 U.S.C. Section 1983; 42 U.S.C. Section 1985; 28 U.S.C. Sections 1331, 1332 and 1343.

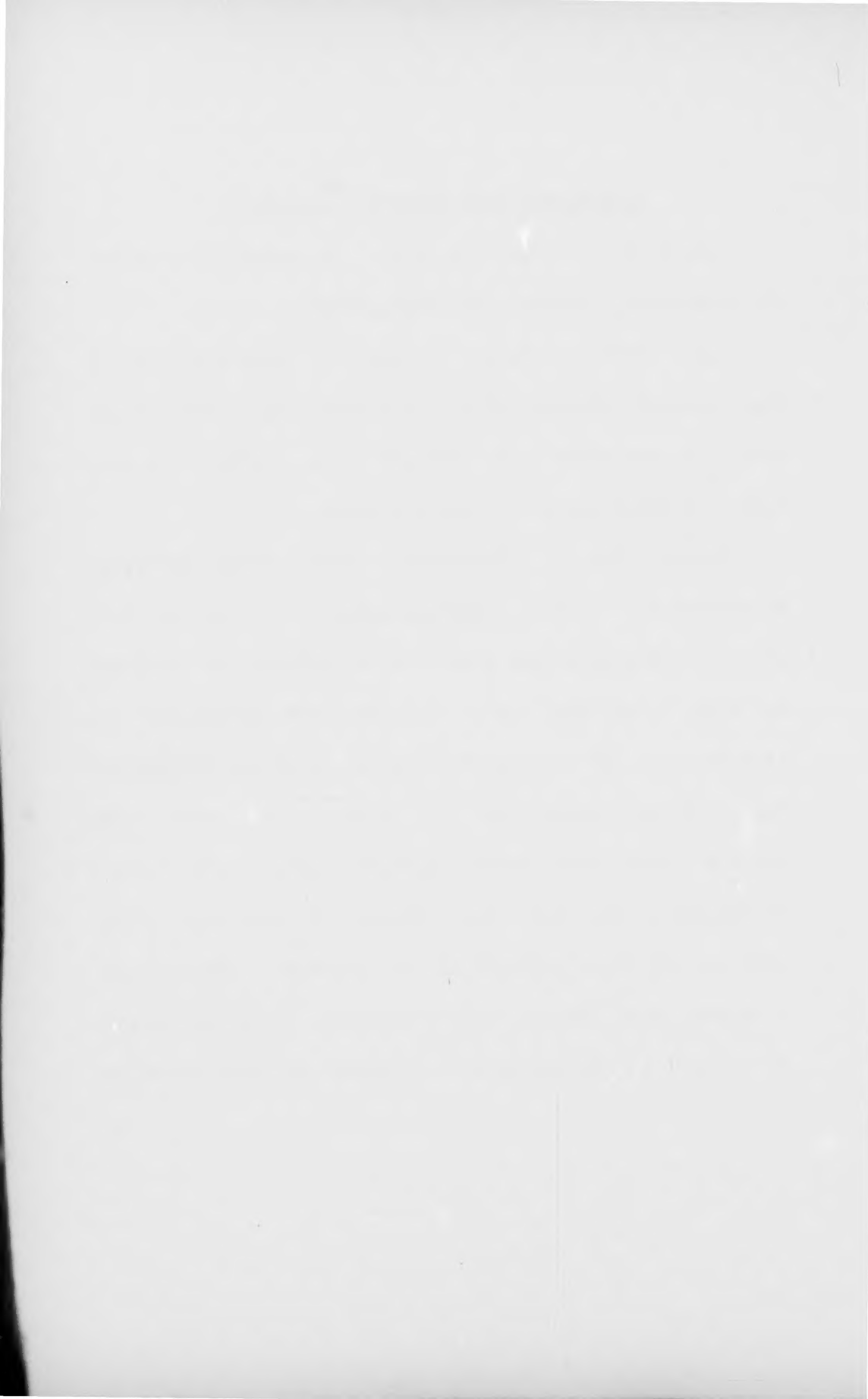


STATUTES AND RULES INVOLVED

28 U.S.C. Section 455. Disqualification
of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of
the United States shall disqualify himself in
any proceeding in which his impartiality
might reasonably be questioned. . . .

Rule 15. Amended and Supplemental
Pleadings. (a) Amendments. A party may
amend his pleading once as a matter of course
at any time before a responsive pleading is
served or, if the pleading is one to which no
responsive pleading is permitted and the
action has not been placed upon the trial
calendar, he may so amend it at any time
within 20 days after it is served. Otherwise
a party may amend his pleading only by leave
of court or by written consent of the adverse



party; and leave shall be freely given when justice so requires. . . .

Rule 35. Physical and Mental Examination of Persons. (a) Order for Examination.

When the mental or physical condition. . . of a party, . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician. . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Rule 41. Dismissal of Actions. (a) Voluntary Dismissal: Effect Thereof.

* * * *



(2) By Order of Court. -- Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.



STATEMENT OF THE CASE

On October 27, 1982, the Petitioner filed an action in the United States District Court for the District of Maryland, alleging a violation of her federal constitutional rights. Specifically, the Petitioner, a psychologist employed by Springfield Hospital Center, alleged that the hospital and eight individual defendants, officials of the hospital, conspired to deprive her of First, Fifth and Fourteenth Amendment rights in violation of 42 U.S.C. 1983 and 1985. The Petitioner also raised two state pendent claims under Maryland law.

The Petitioner filed an amended complaint on November 29, 1982, alleging a violation of the property clause of the Fifth Amendment.

A psychologist at Springfield State Hospital since August 1980, the Petitioner in



the summer and fall of 1981 brought to the attention of Hospital Superintendent, Respondent Krajewski, that two of her patients were seriously ill and had not received adequate medical attention. Only after the Petitioner contacted the patients' families and an outside physician was medical treatment arranged by the Hospital.

Subsequently, the Petitioner was subjected to increased harassment by Respondents. Specifically, she was accused of "problems" in relating to Hospital physicians; she was restricted in her practice as a Hospital psychologist; she received an unsatisfactory performance appraisal; and she was denied full professional privileges and a promotion.

The eight individual Respondents filed timely Answers to the Amended Complaint. Defendant Springfield Hospital Center was

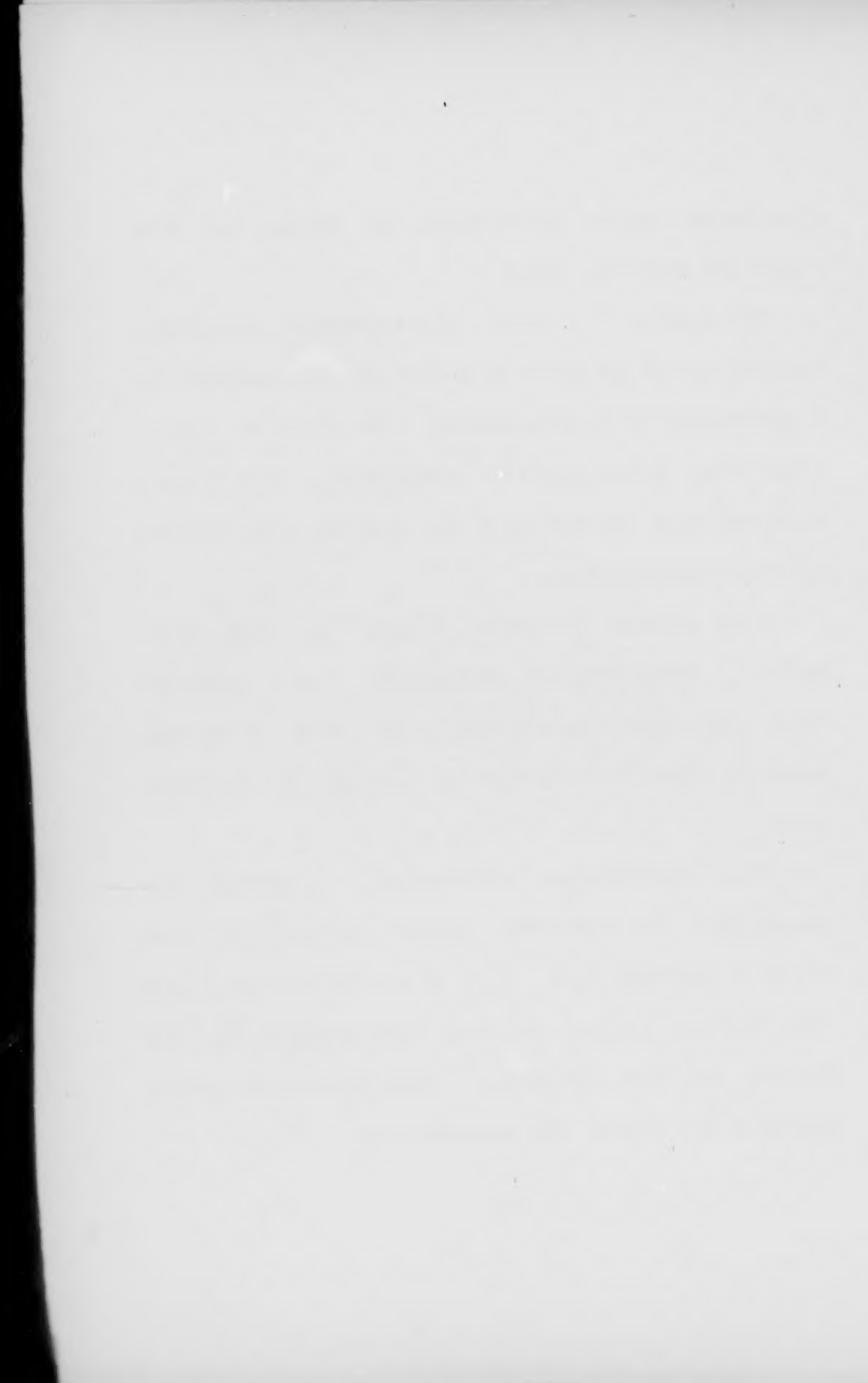


dismissed as a defendant by Order of the Court on May 18, 1983.

On April 7, 1983, Springfield Hospital Center moved to have the Petitioner submit to a psychiatric examination. On July 8, 1984, over the Petitioner's objection, the Court ordered the Petitioner to appear and submit to the examination.

Subsequent to the filing of the complaint, Respondents increased their harassment of the Petitioner at the Hospital causing the Petitioner to resign in August, 1983.

The Petitioner attempted to amend the pleadings to include other defendants and other allegations of discrimination and retaliation prior to and subsequent to the filing of the lawsuit. The District Court refused to allow the amendments.



On February 21, 1984, the Petitioner moved for disqualification of the trial judge due to bias or prejudice, which motion was denied on February 21, 1983. On February 23, 1983, the Petitioner orally moved for voluntary dismissal without prejudice, citing her desire to file a new action adding new defendants and expanding the scope of the pending action. By Order of February 23, 1984, the Court required that the Petitioner file a new case on or before March 12, 1984 and inform the Court in writing, on or before March 12, 1984, whether the Petitioner was able to post a bond of no less than \$10,000.00. Later on February 23, 1984, the Petitioner filed a Motion for Voluntary Dismissal Without Prejudice proposing an alternative plan. On March 12, 1984, the Court entered an Order dismissing the case with prejudice.



On March 12, 1984, the Petitioner filed pro se a complaint in the United States District Court for the District of Maryland, which added new defendants and expanded the acts of discrimination and retaliation alleged against the Respondents and the added defendants, and added allegations of specific patient abuse. Soughik ('Sonia') Kayzakian v. Charles R. Buck, etc., et al., Civil Action No. K-84-974. There is presently pending a Motion to Dismiss which the trial court is holding sub curia pending this Court's ruling.



ARGUMENT

I.

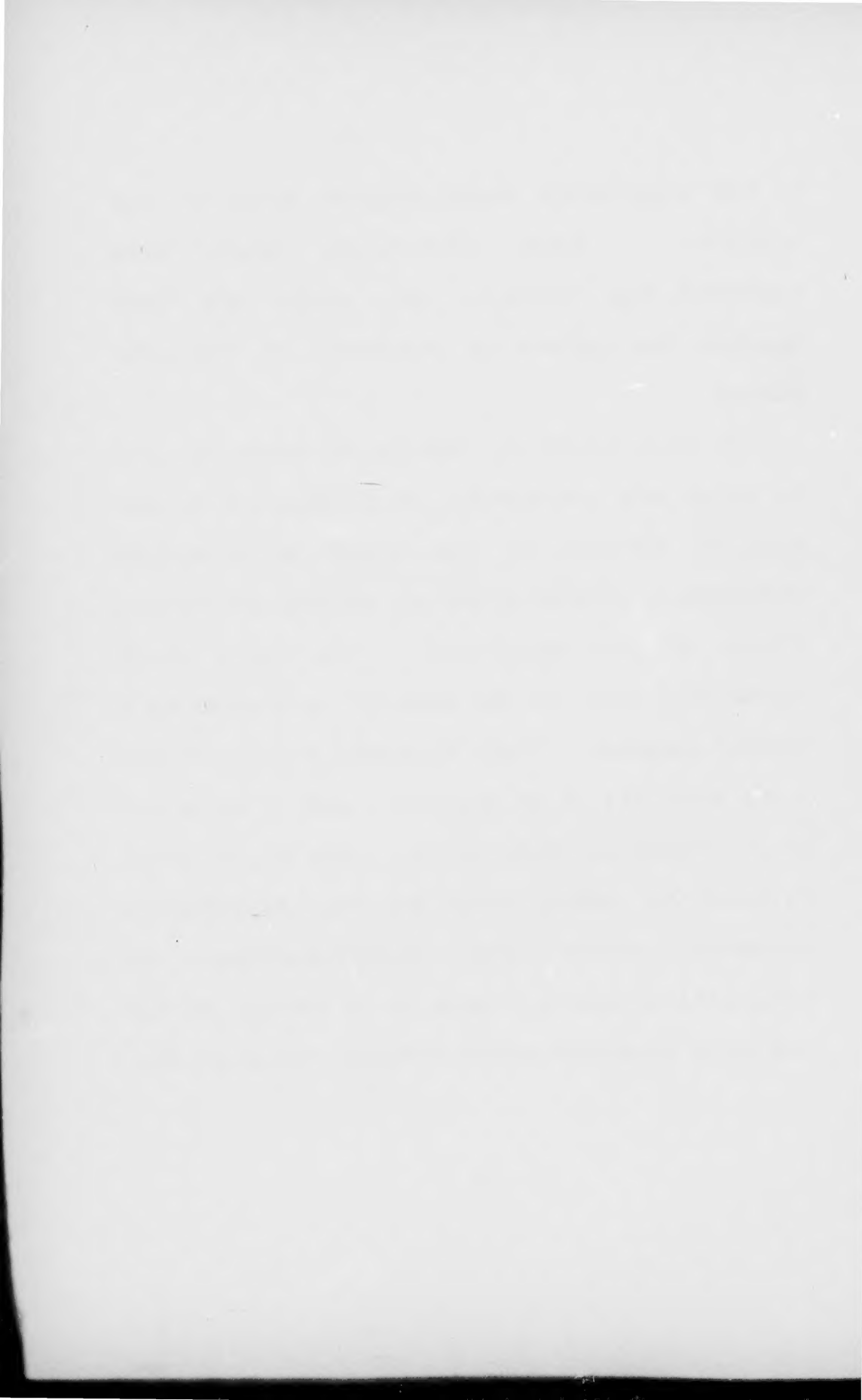
THE TRIAL COURT ERRED IN DENYING THE PETITIONER LEAVE TO AMEND HER PLEADINGS UNDER RULE 15 OF THE FEDERAL RULES OF CIVIL PROCEDURE TO INCLUDE OTHER DEFENDANTS AND ALLEGATIONS CONCERNING DISCRIMINATORY AND RETALIATORY ACTS BY THESE DEFENDANTS AND THE RESPONDENTS, IN VIOLATION OF THE PETITIONER'S FIRST AMENDMENT CONSTITUTIONAL RIGHTS.

On October 17, 1983, December 9, 1983, and December 12, 1983, the Petitioner moved the trial court to amend the pleadings in her pending case to include other defendants who were agents of the state-operated hospital where she was employed, and to include allegations concerning the discriminatory and retaliatory acts of these defendants, and the Respondents herein, against her as a result



of her complaints about patient abuse at the hospital. These amendments would have expanded the lawsuit, but would not have changed the nature or substance of the complaint.

On each occasion, the trial court refused to allow any amendments as to parties to the suit or actions by the named or potential defendants, either prior or subsequent to the filing of the complaint. The trial court ruled that none of the motions were made in a timely fashion. (See Appendix D at a-23-24; D at a-25-31; D at a-31-33; and E at a-34-35.) Based on that ruling, the trial court refused to admit much of Dr. Kayzakian's evidence about the discrimination and retaliation she suffered as a result of her "whistle blowing" about patient abuse at the



hospital. (See Appendix D at a-25-31; D at a-31-33; and F at a-36-37.)

The trial court erroneously believed that Dr. Kayzakian's first counsel, Ms. Mugane, had expanded the lawsuit by earlier amendment. That amendment did not expand the complaint; it merely clarified the cause of action. In May, 1983, Ms. Mugane considered and then failed to request to amend the lawsuit. At that time, counsel's primary concern was gaining leave to withdraw from the case. (See Appendix G at a-38-40.) The court refused her withdrawal until July, 1983, when Mr. Marr began representing Dr. Kayzakian. (See Appendix H at a-41-53.)

The command of Rule 15 is straight forward and permissive. On the facts of the case, fair treatment for the Shermans requires that they not be deprived of their day in court simply because, for a time, their attorney did much to insure that their day would never come. [Emphasis added]



Sherman v. Hallbauer, 455 F.2d 1236,
1242 (5th Cir. 1972).

Rule 15(a) mandates that leave to amend pleadings "shall be freely given when justice so requires." In Foman v. Davis, 371 U.S. 178, 182 (1962), this Court offered guidance for interpreting that requirement:

"If the underlying facts or circumstances relied upon by plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."



The intent of Rule 15 is permissive and liberal. In Tefft v. Seward, 689 F.2d 637 (6th Cir. 1982), there was a four-year delay until the plaintiff sought to amend his complaint. The trial court refused to allow amendment, and the Sixth Circuit reversed, holding:

"The thrust of Rule 15 is to reinforce the principle that cases should be tried on their merits rather than the technicalities of pleadings. . . . That principle provides guidance for appellate courts charged with determining whether a trial judge has abused his or her discretion in denying a requested amendment. . . . and is especially important when, as here, denial of the amendment has resulted in dismissal of the action."

Id. at 639. [citation omitted.] The court of appeals emphasized that the amended cause of action was not so different as to prejudice the defendant, and there was no "undue

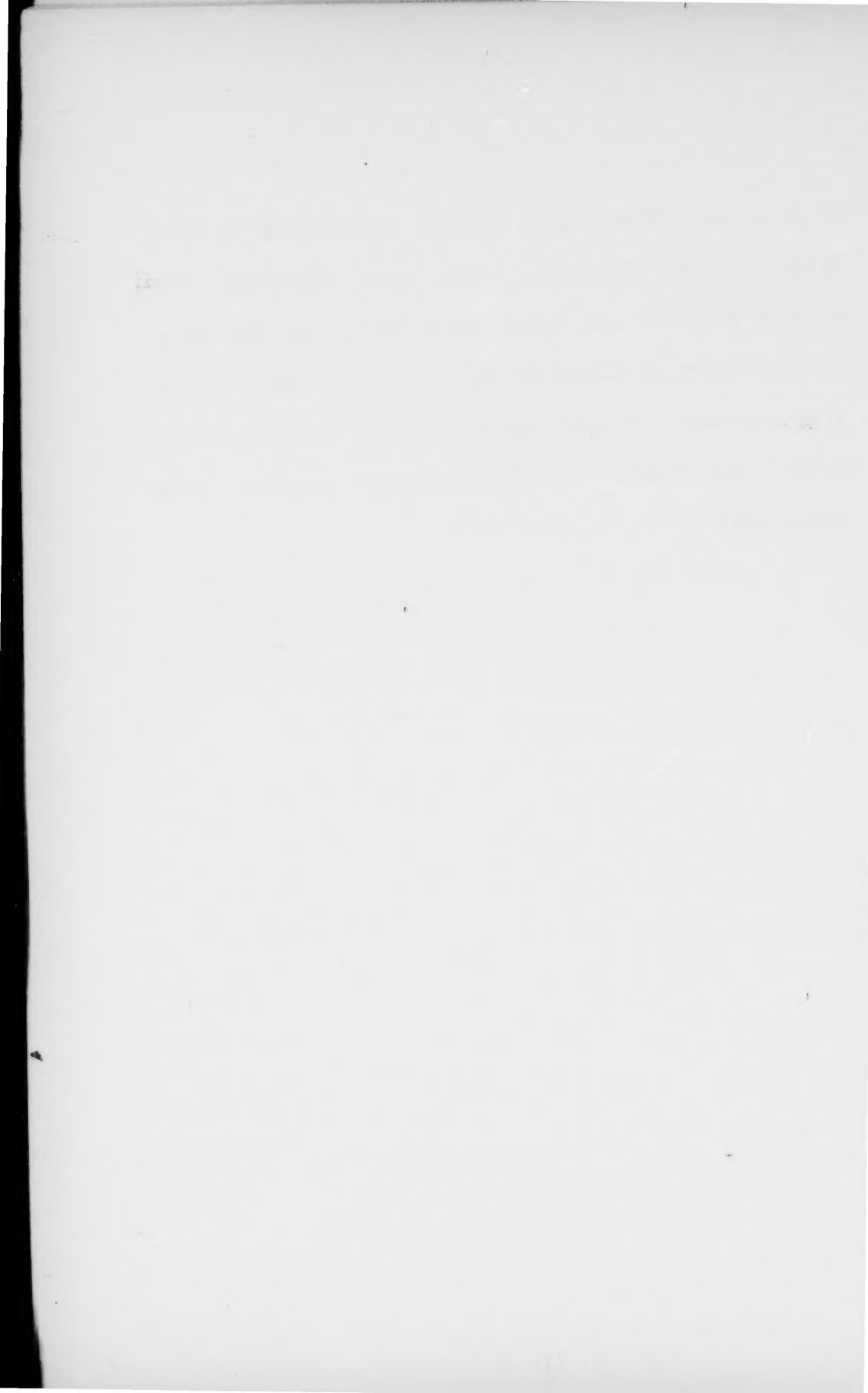


delay" by the plaintiff, even though four years had passed.

Similarly, where Dr. Kayzakian's complaint was originally filed in October, 1982, there was a change in counsel in July, 1983, discovery was still in progress, and a trial date had not been set, the requests for amendments by her second counsel on October 17, 1983, December 9, 1983 and December 12, 1983 were timely made. Delay alone, absent any prejudice or an "obvious design by dilatoriness to harass" the defendant, is not sufficient reason to deny leave to amend. Davis v. Piper Aircraft Corp., 615 F.2d 606, 613 (4th Cir. 1980). Absent any indication of bad faith, prejudice, futility, or undue delay by Dr. Kayzakian, the trial court arbitrarily abused its discretion in refusing to permit appellant to amend her pleadings in



this case. The "fast track" advocated by the trial court to move this case through the system should not have been utilized to deny an indigent plaintiff her day in court and a disposition of her case on its merits when such important constitutional rights are involved.



II

THE TRIAL COURT ERRED IN IMPOSING ONEROUS AND UNREASONABLE TERMS AND CONDITIONS UPON THE PETITIONER UNDER RULE 41(A)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THEN ORDERING A VOLUNTARY DISMISSAL WITH PREJUDICE OF THE INDIGENT PETITIONER'S CIVIL RIGHTS ACTION AGAINST THE RESPONDENTS, AGENTS OF A STATE-OPERATED MENTAL HOSPITAL.

On February 21, 1984, the Petitioner orally moved the trial court to dismiss her complaint without prejudice. As set forth in Argument I, the Petitioner had repeatedly moved to amend her pleading earlier in the case, and the trial court had repeatedly denied these motions. The Petitioner was prepared to make her motion to dismiss on February 17, 1984, at a pre-scheduled court conference which was rescheduled by the trial



court for February 21, 1984. The Petitioner moved to dismiss without prejudice because she desired to file an expanded lawsuit to include all appropriate defendants and acts, which then should have properly been consolidated for trial with the original lawsuit. (See Appendix H at a-53-55.)

The Fourth Circuit erroneously relied on the inaccurate factual statement in Respondents' appeal brief as to the Petitioner's reasons for moving to dismiss her suit without prejudice. The only pretrial evidentiary ruling which the plaintiff sought to avoid was the trial court's refusal to allow her to include all appropriate defendants and allegations by amendment to her complaint. The Petitioner did not seek to avoid the impact of other pretrial evidentiary rulings by this motion. (See Appendix H at a-55-58.)



The Fourth Circuit referred to the Respondents' right to introduce evidence at trial of the Petitioner's attempts to influence two witnesses and of an alleged threat to kill. The trial court ruled only on the admissibility of such evidence, not on its truth, its weight, or the credibility of the witnesses who would offer such evidence at trial. In fact, it was clear from the record that there was much factual dispute as to the integrity of these proffers of evidence.

At the time of its ruling, the trial court acknowledged that the Petitioner was diligently and sincerely pursuing her rights in the present lawsuit. The court found no showing of willful default, no clear record of delay and no contumacious conduct on her part. (See Appendix H at a-60-66.)



A plaintiff's motion for voluntary dismissal without prejudice "should be granted absent a showing that the defendant will suffer substantial prejudice as a result thereof." Manners v. Fawcett Publication, Inc., 85 F.R.D. 63, 65 (S.D.N.Y. 1979).

"The crucial question to be determined is, Would the defendant lose any substantial right by the dismissal. "In exercising its discretion the court follows the traditional principle that dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second law suit. It is no bar to dismissal that plaintiff may obtain some tactical advantage thereby."

Durham v. Florida East Coast Railway Co., 385 F.2d 366, 368 (5th Cir. 1967) (emphasis in original). Dismissal with prejudice is appropriate "only in the face of a clear record of delay or contumacious conduct by the plaintiff" Id.



Rule 41(a)(2) allows the court to condition an order of dismissal without prejudice "upon such terms and conditions as [it] deems proper." Conditions should be imposed; however, "only when justice so demands," Manners v. Fawcett, 85 F.R.D. at 65, and a Rule 41(a)(2) motion to dismiss can be properly granted without any conditions at all, Bready v. Geist, 85 F.R.D. 36, 37 (E.D. Pa. 1979).

The trial court below set two conditions under Rule 41(a)(2): that the Petitioner file a new lawsuit and that she provide a \$10,000.00 bond or payment of monetary costs to the court for the anticipated duplicative attorney's fees to be incurred by the Attorney General's office. (See Appendix H at a-60-65.)



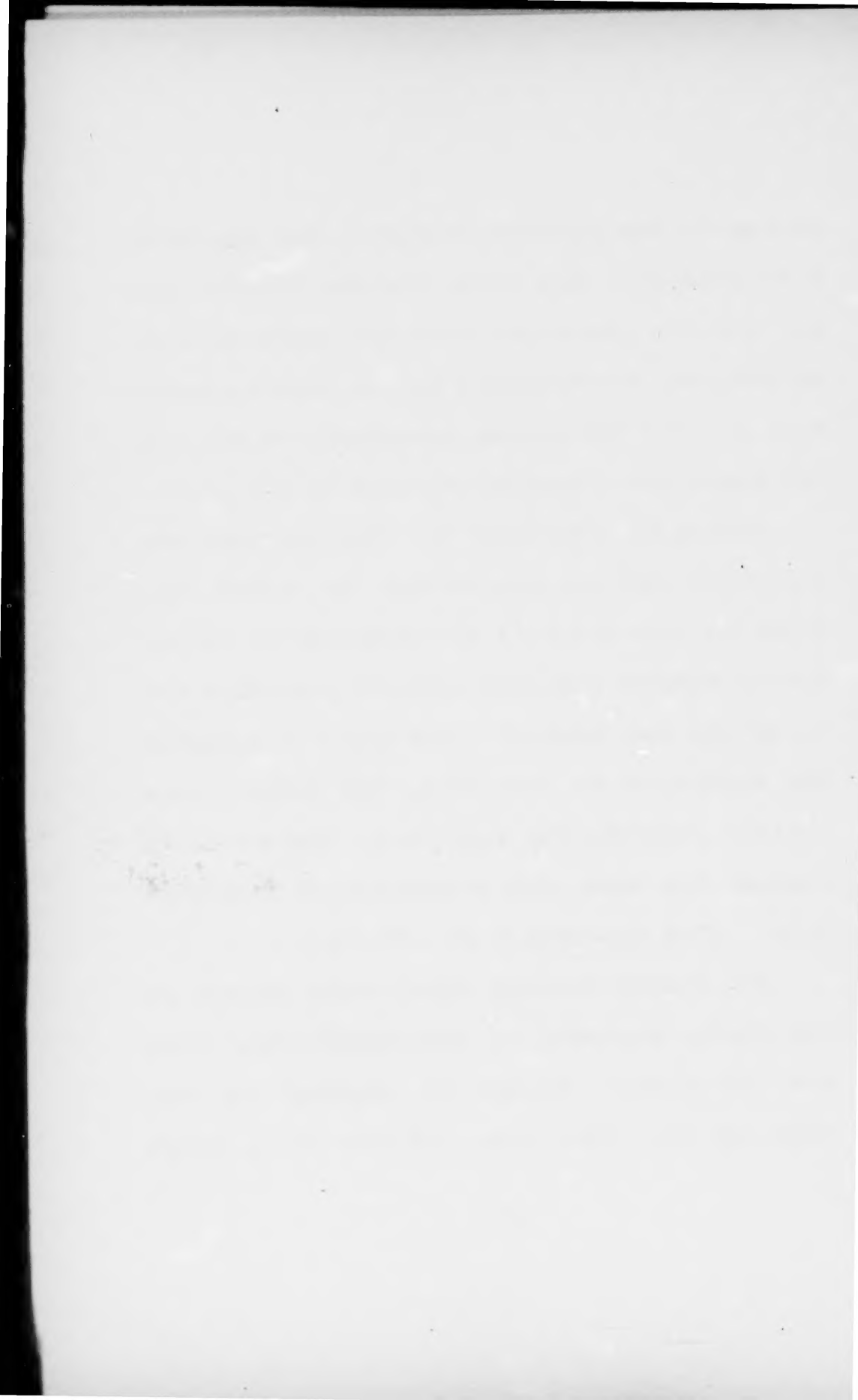
The only prejudice that the trial court determined the Respondents would suffer was the speculative cost of increased or duplicative attorney's fees. As set forth in Argument I, had the trial court granted the Petitioner's motion to amend when it was initially made, this speculative cost would have been obviated. Moreover, the court should have acknowledged that nearly all the legal services rendered the Respondents in connection with the Petitioner's initial complaint would have been directly applicable to her new lawsuit. Bready v. Geist, 85 F.R.D. at 38; Manners v. Fawcett Publications, Inc., 85 F.R.D. at 65-66.

When setting the bond condition, the trial court knew that the Petitioner had no funds with which to fulfill this requirement, because she had filed an in forma pauperis

motion in the pending lawsuit; (See Appendix H at a-59-60); she filed the new lawsuit pro se; and she requested that the court appoint an attorney to represent her in further legal action. The Petitioner repeatedly emphasized her desperate financial straits to the court.

During the February 21, 1984 hearing, the plaintiff had no choice but to accept the terms of the bond if she desired to voluntarily dismiss her suit without prejudice and to expand her lawsuit. Had she not accepted the condition of the bond, the trial judge plainly informed the Petitioner that he would dismiss the case with prejudice on that very date. (See Appendix H at a-70-77.)

The Fourth Circuit erroneously relied on the facts provided by the Respondents that the Petitioner failed to respond to the February 23, 1984 Order of the trial court



requiring the Petitioner to respond regarding her ability to meet the condition of a bond by March 12, 1984. (See Appendix C-1 at a-12.)

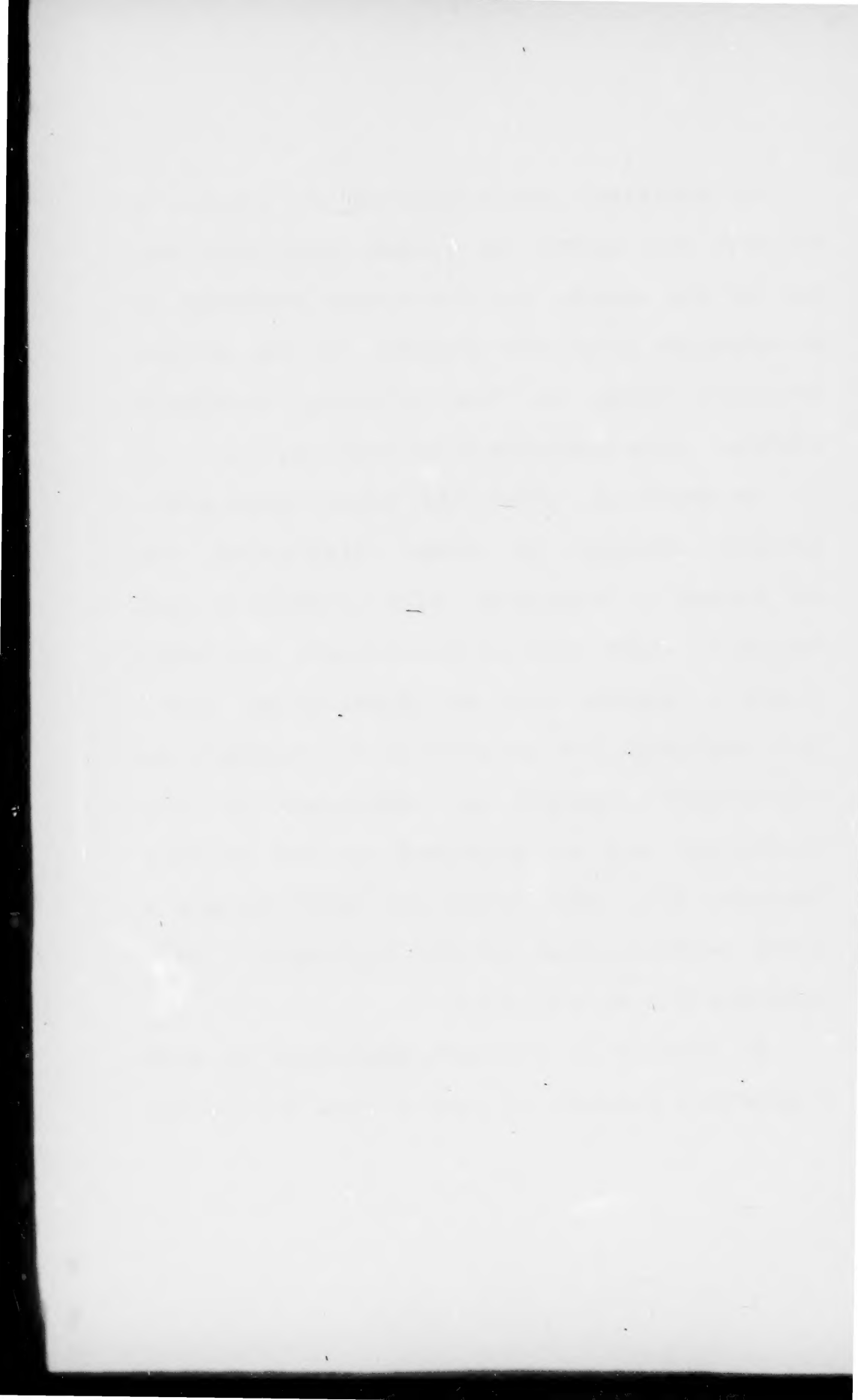
On February 21, 1984, and February 22, 1984, the Petitioner made it quite clear to the trial court that she was unable to make a bond or monetary payment in any amount for payment of attorney's fees to the Attorney General's Office. On February 22, 1984, the Court denied the Petitioner's request for an extension of thirty days to search for financial assistance. (See Appendix H at a-59-60; H at a-66-70; I at 78-84.) On February 23, 1984, after the entry of the trial court's order requiring a response, the Petitioner filed a written motion and memorandum responding to that Order. (See Appendix J at a-85-96.)



In addition, again stating her inability to meet any amount of a cash bond that was set by the court, the Petitioner proposed an alternative plan for payment of any actual economic costs to the Attorney General's Office. (See Appendix J at a-85-96.)

On March 12, 1984, the trial court arbitrarily entered an order dismissing the Petitioner's complaint with prejudice and failed to rule upon or acknowledge the Petitioner's motion for an alternative plan. (See Appendix C-2 at a-21-22.) Further, no evidentiary hearing as requested by the Petitioner and as promised in the court's February 23, 1984 Order was held before a final determination of the dismissal. (See Appendix C-1 at a-12-20.)

To require an indigent plaintiff to make a monetary payment or post a bond in a civil



rights action against a state agency, where another state agency is representing the defendant, is tantamount to setting an impossible condition. It produces the effect that only the rich and powerful are able to air their legitimate grievances in court. It violates the Petitioner's constitutional right of due process and chills her expression of her First Amendment rights. Although monetary conditions on a voluntary dismissal might generally work prejudice only in a "practical sense," the conditions imposed upon Dr. Kayzakian amounted to "legal prejudice" that denied her any meaningful access to the court. See LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 603-04 (5th Cir. 1976).



III.

WHETHER THE DISTRICT COURT JUDGE FAILED TO RECUSE FROM THE CASE AS MANDATED BY 28 U.S.C. SECTION 455, AND WHETHER HIS PARTIALITY WITH RESPECT TO THE RESPONDENTS' EXPERT WITNESS VIOLATED THE PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL TRIER OF THE FACTS.

The Petitioner moved the District Court Judge to recuse due to his bias and prejudice under 28 U.S.C. Section 455(b)(1). The judge denied her motion. However, the judge had a duty "sua sponte" to disqualify himself from the case if a reasonable person knowing all the relevant facts would believe that the court was not impartial. Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980).

Over the Petitioner's objections, the trial judge ordered that she submit to a



mental examination by Respondents' psychiatrist and psychologist.

Dr. Kayzakian was concerned about the manner and the scope of the examination, and the preservation of a record by use of a recording device or the presence of an impartial witness throughout the examination.

The trial court approved the Respondents' choice of psychiatrist Dr. Henderson to perform the examination and psychologist Dr. Harrison to assist him.

The court repeatedly made references to Dr. Henderson's integrity, abilities and credibility as known to the court from contact with Dr. Henderson from matters not related to Dr. Kayzakian's case. The judge accepted Dr. Harrison's credentials on Dr. Henderson's recommendation.



During a break in the examination, Dr. Henderson claimed to have overheard a telephone conversation in which Dr. Kayzakian, speaking in French, allegedly threatened to kill two doctors and a female attorney involved in the case.

Dr. Kayzakian, through counsel, denied threatening to kill anyone, and objected to the intimidating and harassing scope of certain questions put to her during the examination.

The Petitioner requested a hearing to determine the veracity of the claims made by Dr. Henderson before the court acted on them.

The trial judge denied this request based on his own knowledge of the credibility and integrity of Dr. Henderson, the Respondent's expert witness.

The trial judge recited:



"THE COURT: Now, I want you to start assuming arguendo the following. As I mentioned to Mr. -- as I have mentioned before to Mr. Hecker and perhaps to you, but certainly to Ms. Mugane and her co-counsel, the original plaintiff's co-counsel, I have had Dr. Henderson testify before me a number of times. I know a great deal about Dr. Henderson.

I do not know to what extent, Mr. Marr, you used him when you were a United States Attorney or to what extent he was used then, but he has been used by the United States Attorney's office considerably.

He has been used in various ways by this Court for defendants as well as -- by the Court for help, by the Federal Public Defender, by the U. S. Attorney.

MR. MARR: I'm aware, Your Honor.

THE COURT: He has the highest kind of standing. I cannot believe for a moment that he asked improper questions. The fact that Dr. Kayzakian might say that those questions were asked would not necessarily mean that Dr. Kayzakian was telling the truth or not telling the truth.

* * *



And, Mr. Marr, I will tell you, before I hear from you, I am a little shocked and surprised to hear somebody with your prosecutorial background and with the -- who has had the kind of experience you have had start off that way.

Now, first of all, we will have to find out -- from Dr. Henderson and Dr. Harrison what kind of questions they asked Dr. Kayzakian.

I would like to find out what they say as to whether they asked the kind of questions that Dr. Kayzakian indicated to her counsel were asked of her." Transcript of Soughik ('Sonia') Kayzakian v. Thomas F. Krajewski, etc., et al., July 14, 1983.

The trial judge never held a hearing as requested by counsel, but relied on his extra-judicial knowledge of Dr. Henderson. Subsequently, in an evidentiary hearing, the trial judge ruled that the alleged death threat evidence overheard by Dr. Henderson was admissible as an admission of weakness in her case by Dr. Kayzakian.

Mr. Marr, counsel for Dr. Kayzakian, attempted at the outset to inform the judge that the alleged death threats were probably statements he made to her in French as to their plan "tuer" or to destroy the Respondents' case. (See Appendix K at a-97-98.) The judge ignored these attempts at clarification, which a hearing would have provided. Months later after deposing Dr. Henderson, Mr. Marr realized that he was a witness in the case, and he used the words "tuer" or "to kill" or "to destroy" in a conversation with Dr. Kayzakian. Counsel agreed to stipulate that testimony at trial. (See Appendix K at a-99-102.)

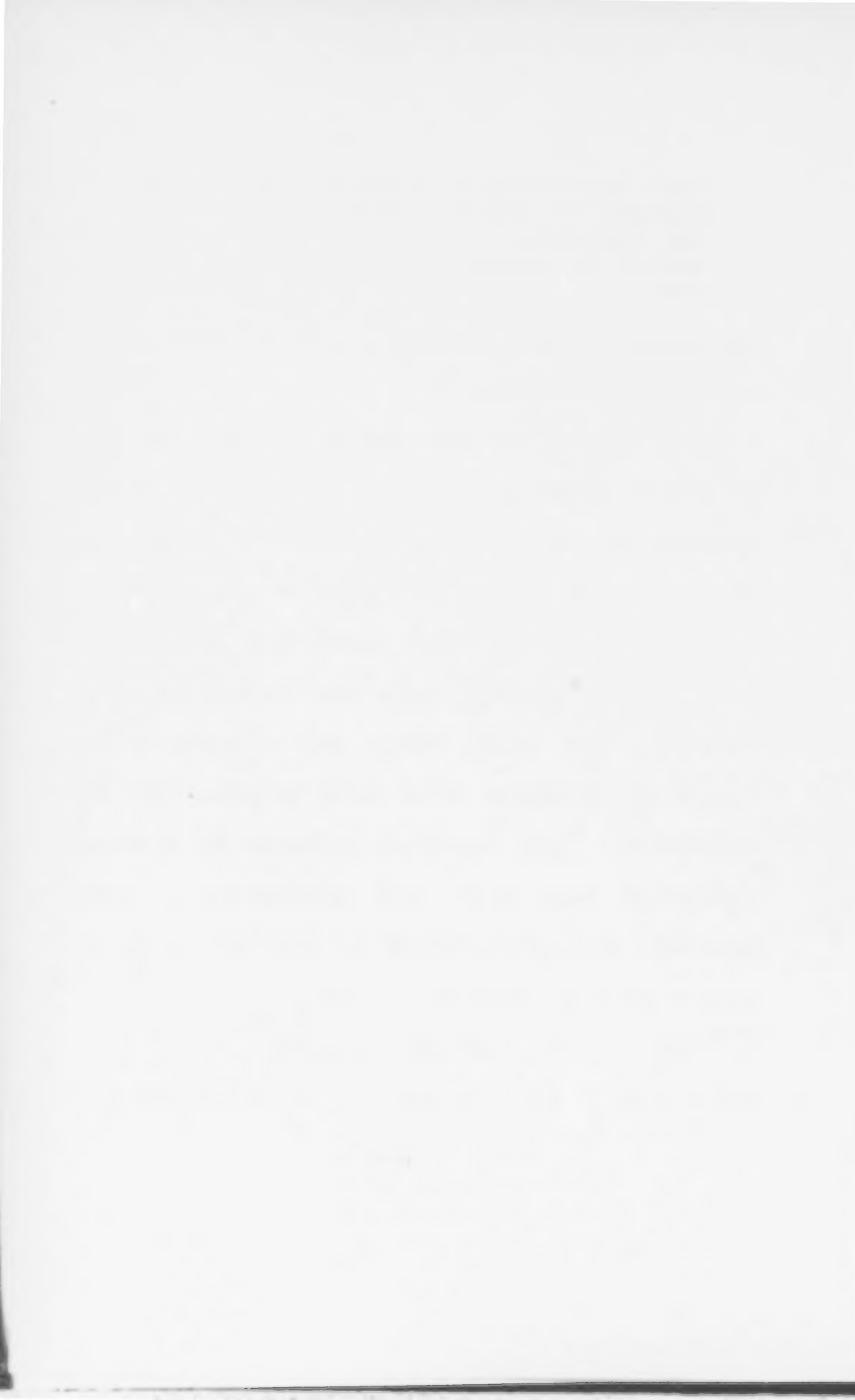
As a result of his partiality toward Dr. Henderson the trial judge failed to realistically view him as a "hired gun" for the Respondents.

The defendant's expert is being engaged to advance the interests of the defendants; clearly the doctor cannot be considered a neutral in the case.

Zabkowicz v. West Bend Co., 585 F. Supp. 635, 636 (E.D. Wis. 1984).

The report of the death threats by Dr. Henderson greatly influenced the trial judge against Dr. Kayzakian. After that date, it is clear from the record that he believed Dr. Kayzakian was a difficult and disturbed person. It appears from the record in this case that the trial judge was looking for a reason to dismiss this case because of his prejudice. His repeated threats to dismiss emphasize his bias and prejudice. (See Appendix H at a-55-56; H at a-65-66; L at a-102; M at a-103-104.)

The trial judge ordered that Dr. Henderson tape the mental examination and



that the tapes then be kept in the custody of Respondents' counsel.

The Petitioner claimed part of the examination was missing from the tapes made by Dr. Henderson and Dr. Harrison which were kept in Respondents' attorney's office. Dr. Kayzakian had attempted to tape the examination herself but was unable to tape the entire proceeding because she was "taking the test." As a result Dr. Kayzakian was unable to show that her rights had been violated.

The trial judge relied on affidavits from Dr. Henderson and Dr. Harrison and an exchange of letters from Respondents' counsel to determine the integrity of the tapes, despite objection by the Petitioner's counsel.

Dr. Kayzakian's rights were totally unprotected. Due to his partiality toward



Dr. Henderson, the District Court judge allowed the fox to guard the chicken coop.

In Roberts v. Bailar, 625 F.2d 125, 127 (6th Cir. 1980) the trial judge remarked that he knew the defendant party to the lawsuit in a sex discrimination case and that

I know Mr. Graves, and he is an honorable man and I know he would never intentionally discriminate against anybody.

The Appeals Court emphasized that the standard of impartiality is an objective standard, the judge's introspective estimate of his own ability impartially to hear a case is no longer valid.

We intimate no opinion regarding the actual impartiality of the District Judge. Instead, it is the appearance of impartiality with which we are concerned. As the Supreme Court has written, "justice must satisfy the appearance of justice." Clearly, under Section 455(a), the District Judge had a duty to recuse himself in order to preserve the indispensable semblance of fairness. Id.

Public confidence in the impartiality of the federal justice system is of the utmost importance. The District Court judge should have disqualified himself from the case "sua sponte" with or without any motion by the Petitioner.

IV.

THE TRIAL COURT ERRED IN ITS FAILURE TO IMPOSE PROPER CONDITIONS FOR THE PSYCHIATRIC EXAMINATION OF THE PETITIONER BY RESPONDENT'S PSYCHIATRIST AND PSYCHOLOGIST PURSUANT TO RULE 35 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Pursuant to Rule 35 of the Federal Rules of Civil Procedure and Respondents' motion, the trial court, over the Petitioner's objections, ordered her to submit to a psychiatric examination by two defense witnesses, Dr. Henderson, a psychiatrist and Dr. Harrison, a psychologist. The trial court entered a protective order to safeguard the rights of the Petitioner at this intrusive type of examination.

The trial court refused to allow the Petitioner's counsel to be present at the

examination, or a court reporter to record the examination, but allowed two tapes to be made by Dr. Henderson and Dr. Harrison. The Court allowed them to monitor the tape recorders and to then turn custody of the tapes over to Respondent's counsel at the Attorney General's Office. The tapes were to be safeguarded in the hands of the Respondents' experts and then in the hands of Respondents' attorneys.

When a controversy arose as to the substance of the examination and as to missing parts of the tape, the Petitioner had no accurate and reliable record of what transpired at the mental examination due to the failure of the court to safeguard her rights.

Dr. Kayzakian was put in the position of placing her word against the word of the

Respondents' two examiners. She was deprived of evidence in the form of proper tapes monitored and maintained by a neutral person. As articulated in Argument III, because of the Court's partiality toward Dr. Henderson, the court accepted Dr. Henderson's version of the integrity of the tapes. Dr. Henderson should never have been appointed to monitor and maintain the tapes of the examination, not only because he was the Respondents' expert, but especially because of the trial judge's partiality toward him.

In Zabkowicz v. West Bend Co., 585 F. Supp. 634 (E.D. Wis. 1984), the court recognized that a defendant's expert is not a neutral party. The Court held

In sum, I do not believe that the role of the defendants' expert in the truth-seeking process is sufficiently impartial to justify the license sought by the defendants. Accordingly, the plaintiffs, at their option,



are entitled to have a third party (including counsel) or a recording device at the examination. Id. at 636.

If the recording device is utilized, it must be monitored and maintained by a neutral party. The District Court failed to preserve this neutrality.



CONCLUSION

WHEREFORE, for the reasons set forth above, the Petitioner respectfully prays that this Court grant this Petition for Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted, this 20TH day of October, 1986.

Carol A. N. Breit

Carol A. N. Breit
CLUTE & SHILLING
Old City Hall, Suite 405
1001 East Broad Street
Richmond, VA 23219
(804) 788-1509
Counsel for Petitioner

CERTIFICATE OF SERVICE

This is to certify that I have this day served Stephen H. Sachs, Attorney General, Munsey Building, Calvert and Fayette Streets, Baltimore, Maryland 21202, counsel for Respondents in the foregoing matter, with a copy of this pleading by depositing in the U.S. Postal Service a copy of same in a properly addressed envelope with adequate postage thereon.

This 20th day of October, 1986.

Carol A. N. Breit

Carol A. N. Breit
CLUTE & SHILLING
Old City Hall, Suite 405
1001 East Broad Street
Richmond, VA 23219
(804) 788-1509
Counsel for Petitioner



A P P E N D I X



APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1460

Soughik ('Sonia') Kayzakian,

Appellant,

versus

Thomas F. Krajewski, Sued in his
individual as well as official
capacity, Superintendent, Spring-
field Hospital Center;

Jonathan D. Book, Sued in his
individual as well as official
capacity, Clinical Director,
Springfield Hospital Center;

Peter T. Pompilo, Sued in his
individual capacity;

Irfran S. Esendal, Sued in his
individual as well as official
capacity, Director, Martin Gross
Unit, Springfield Hospital
Center;



Reza G. Bassiri, Sued in his individual as well as official capacity, Director, City Division, Springfield Hospital Center;
Deusdedit Jolbitado, Sued in his individual as well as official capacity, Chair, Hospital Privileging Committee, Springfield Hospital Center;
Philip P. Townsend, Sued in his individual as well as official capacity, Personnel Administrator, Springfield Hospital Center;
Springfield Hospital Center;
Bruce L. Regan, Sued in his individual as well as official capacity, Director of Psychiatric Education and Training, Mental Hygiene Administration, Department of Health and Mental Hygiene,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frank A. Kaufman, Senior District Judge. No. 82-3141)

Submitted: April 30, 1986 Decided: June 2, 1986

Before HALL, PHILLIPS and MURNAGHAN, Circuit Judges.



(Soughik Kayzakian, Appellant Pro Se.
Stephen N. Sachs, Attorney General, David E.
Beller, Assistant Attorney General; Daniel
J. O'Brien, for Appellees.)

PER CURIAM:

On February 21, 1984, only three working days before the scheduled trial of this employment discrimination action, Soughik Kayzakian orally sought leave from the district court to dismiss her action without prejudice. Kayzakian submitted a written Rule 41(a)(2) motion two days later. A central purpose of these motions, as recognized at the February 21 hearing, was to enable Kayzakian to avoid the impact of several pretrial evidentiary rulings handed down by the district court at a January 20



hearing.* Observing that a last-minute, unconditional "without prejudice" dismissal would be clearly improper as unfairly prejudicial to the defendants, the court offered Kayzakian three distinct options.

The first option was to proceed with the February 27, 1984 trial. The second option was to dismiss without prejudice, under such terms and conditions (if any) as would alleviate the injury that a dismissal without terms and conditions would cause the

*Kayzakian did not want the case to be tried unless additional defendants and allegations were added. The evidentiary rulings would have prevented Kayzakian from introducing matters at trial unrelated to the "protected activity" that allegedly gave rise to her First Amendment/retaliation claim. In addition, defendants would have been permitted to introduce evidence at trial of Kayzakian's attempts to influence the testimony of two peripheral defendants and of her threat to kill lead defense counsel and two defense witnesses.



defendants. See Fed. R. Civ. P. 41(a)(2). The district judge noted that, at a minimum, an appropriate condition would be a cash payment (or bond) in an amount compensating the defendants for those fees and expenses that would not have been incurred had Kayzakian's proposed broader lawsuit been filed initially. The third option was to dismiss with prejudice.

In response, and following a lengthy consultation with her attorney, Kayzakian rejected outright the first option and expressed interest in the second option. Both Kayzakian and her counsel thereafter acknowledged their understanding that an inability to comply with the court's ultimate terms and conditions would result in a "with prejudice" dismissal.

On February 23, 1984, the district court



issued a memorandum and order recounting the events that had transpired at the February 21 hearing. The court observed that Kayzakian had committed herself irrevocably to the dismissal of her lawsuit. The court also recounted Kayzakian's expressed intentions to file an expanded lawsuit and to make efforts to secure a satisfactory "bond." The court then ordered Kayzakian "to inform this Court in writing, on or before ... March 12, 1984 whether [she] is able to post a bond ... to reimburse defendants for such costs and expenses, if any, as defendants may incur because of the need for repetitive work and proceedings in the new case which would not have occurred had plaintiff proceeded timely in the within



case." The failure to comply with that reporting requirement, the court indicated, would likely result in a prompt dismissal with prejudice. A copy of the February 23 memorandum and order was delivered to Kayzakian's counsel.

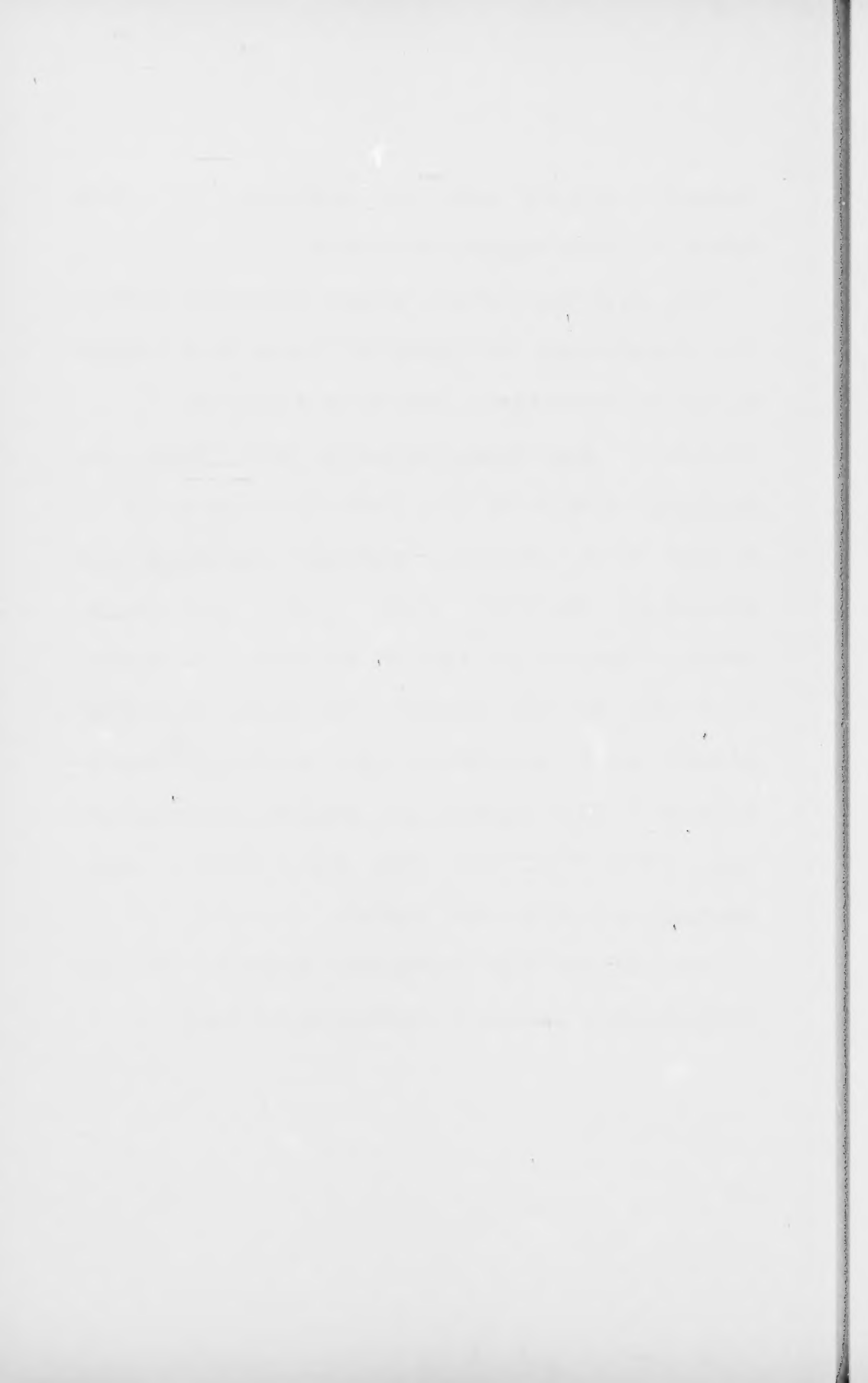
Neither Kayzakian nor her lawyer responded to the February 23 directive. Consequently, defense counsel on March 13, 1984 requested the court to dismiss Kayzakian's lawsuit with prejudice. A copy of that March 13 request was delivered to Kayzakian's counsel, who again chose not to respond. One week later, on March 20, 1984, the action was dismissed with prejudice "in the light of (a) plaintiff's failure to supply the requested information as to bonding, and (b) the entire record in this case and for the reasons previously stated on the



record, orally and in writing, by this Court." This appeal followed.

The district court acted entirely within its discretion in imposing terms and conditions on Kayzakian, the Rule 41(a)(2) movant. See Home Owner's Loan Corp. v. Huffman, 134 F.2d 314 (8th Cir. 1943); 9 C. Wright & A. Miller, Federal Practice and Procedure Section 2366 (1971 and Supp. 1985). Kayzakian failed to meet the condition set by the court. As such, the dismissal with prejudice was entirely appropriate. See Yloffe v. Keller Industries, Inc., 582 F.2d 982 (5th Cir. 1978), cert. denied, 440 U.S. 915 (1979).

We affirm the judgment below. As the dispositive issues recently have been



decided authoritatively, we dispense with oral argument.

AFFIRMED



APPENDIX B

**FILED
JUL 22 1986
U.S. Court of Appeals
Fourth Circuit**

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 84-1460

Soughik ('Sonia') Kayzakian,

Appellant,

versus

Thomas F. Krajewski, etc., et al,

Appellees.

**Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frank A. Kaufman, District Judge**



Upon consideration of the appellant's pro
se petition for rehearing and the supple-
ments,

IT IS ORDERED that the petition for re-
hearing is denied.

Entered at the direction of Judge
Phillips with the concurrence of Judge Hall
and Judge Murnaghan.

For the Court,

s/ John M. Greacen
CLERK



APPENDIX C-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SOUGHIK ('SONIA') KAYZAKIAN :

v. : CIVIL NO.

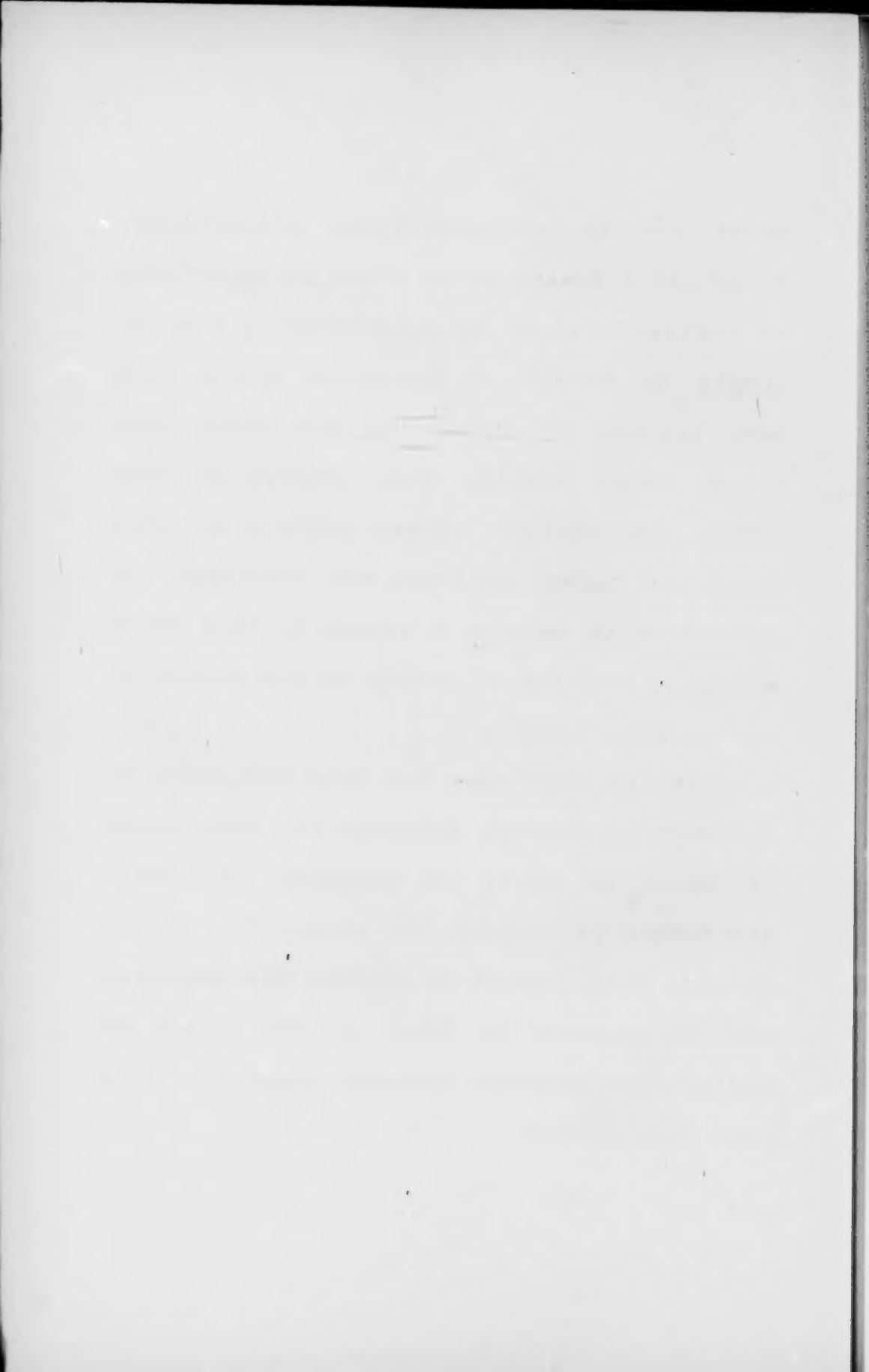
THOMAS F. KRAJEWSKI, ETC., : K-82-3141
ET AL.

MEMORANDUM AND ORDER

During a hearing in open court on the record held on February 21, 1984 and a conference on the telephone on the record held on February 22, 1984, counsel for plaintiff informed this Court that plaintiff was seeking to dismiss the within case without prejudice, but that if this Court would not grant plaintiff's said motion to dismiss without prejudice, plaintiff in any event did not desire the within case to go to trial without further amendment of plaintiff's complaint to add additional defen-

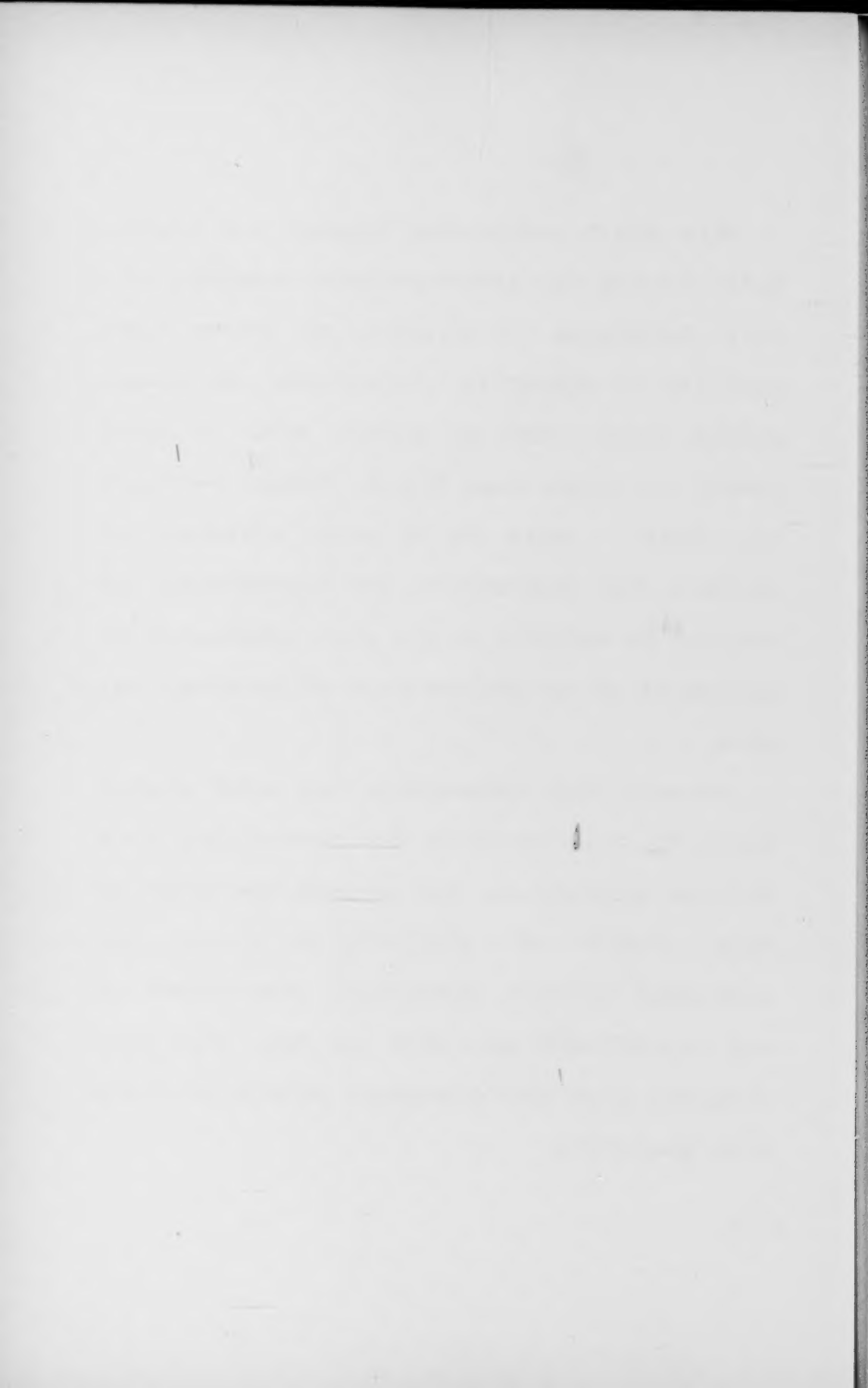
dants and to add additional allegations. Plaintiff's desire so to amend is repetitive of earlier similar or substantially similar quests on behalf of plaintiff which have been opposed by defendants and which this Court, after hearing from counsel on both sides, has denied. Those denials by this Court are hereby affirmed and confirmed for reasons which have been stated by this Court either in writing or orally on the record at one or more times.

Trial of this case has been scheduled to commence on Monday, February 27, 1984 since at least as early as December 15, 1983. Statements of counsel for plaintiff, on the record, with regard to plaintiff's decision not to proceed to trial on the basis of plaintiff's present amended complaint have been made orally.



This Court instructed counsel for plaintiff, during the aforementioned February 22, 1984 telephone conference, to state that position by plaintiff, in writing, in appropriate form, and to submit same to this Court, no later than 5 p.m. today, February 23, 1984. This Court also afforded to counsel for defendants the opportunity to respond in writing to any such submission by plaintiff on or before noon on February 24, 1984.

Counsel for defendants, in oral statements to this Court on the record, and in a written submission, has opposed the grant by this Court of plaintiff's quest for dismissal without prejudice, regardless of any conditions attached to the same and contends that the dismissal should be fully with prejudice.

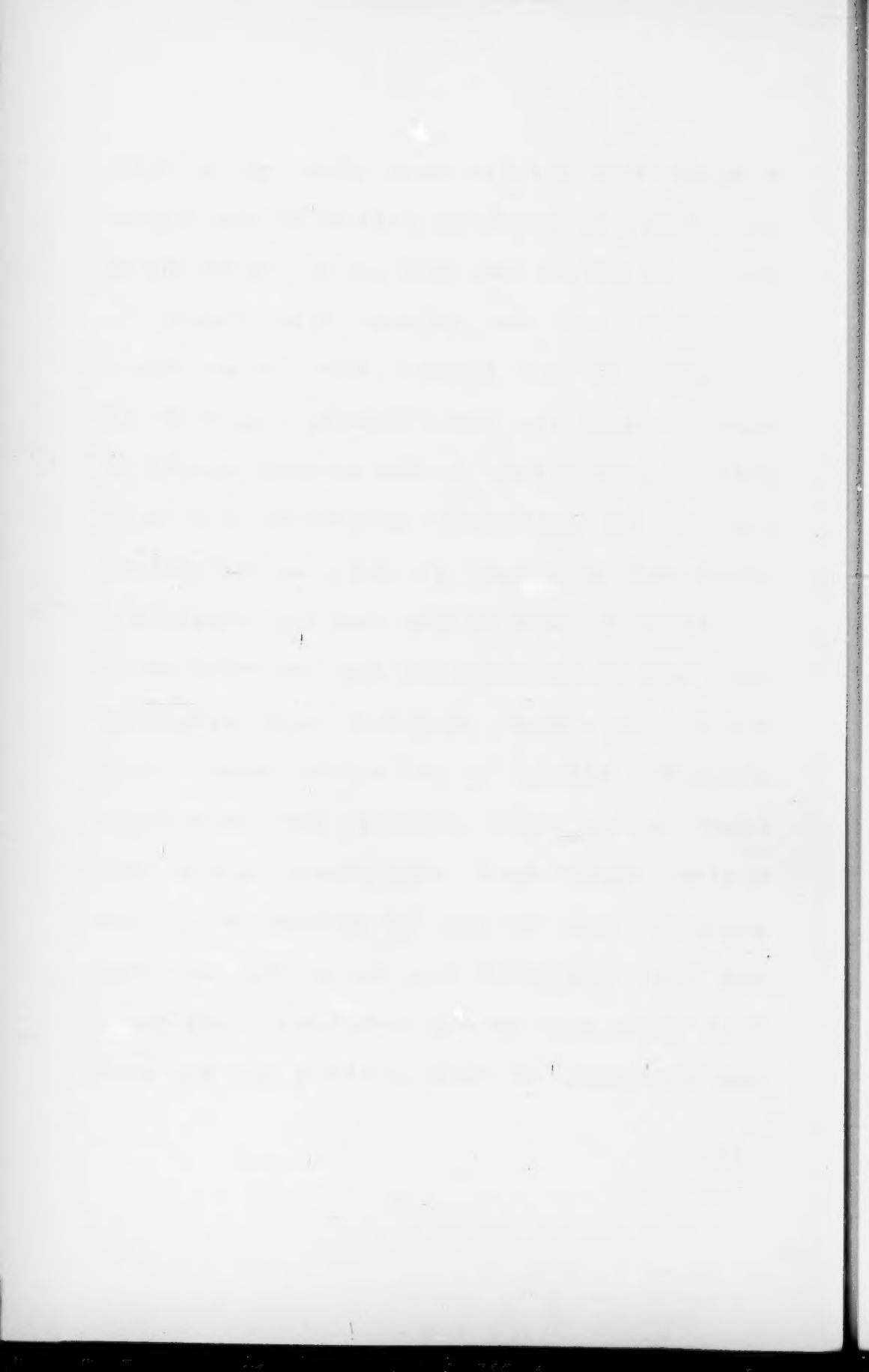


Counsel for plaintiff has stated that plaintiff intends to file a new case in this Court, in which plaintiff will set forth in her complaint all of the allegations she desires to state, including those which this Court has not permitted plaintiff to state by amendment, and to name in such complaint all of the defendants plaintiff desires to name, including defendants who are not defendants in the within case and whom plaintiff has attempted unsuccessfully to add prior to this date as defendants in the within case.

Tentatively, as of this date, prior to receiving the written submissions referred to hereinabove from counsel on either or both sides later today, February 23, 1984 or tomorrow, February 24, 1984, this Court expects, before determining whether to



dismiss the within case with or without prejudice, to grant to plaintiff the opportunity to file a new case on or before March 12, 1984 and to inform this Court in writing, on or before that same date, namely, March 12, 1984, whether plaintiff is able to post a bond in the minimum amount of \$10,000 to reimburse defendants for such costs and expenses, if any, as defendants may incur because of the need for repetitive work and proceedings in the new case which would not have occurred had plaintiff proceeded timely in the within case. This Court notes that counsel for defendants claims that such additional costs and expenses will be far in excess of \$10,000 and that plaintiff has in no way conceded that there will be any such additional costs and expenses, or that if there are any such



additional costs and expenses, plaintiff should be required to bear the burden of the same. In those connections, both sides will be afforded full opportunities to be heard. However, as of this date, on a tentative basis, this Court believes that it is quite possible that such additional costs and expenses would total \$10,000 or more.

If plaintiff files any such new case on or before March 12, 1984 and desires to continue to pursue her quest for the within case to be dismissed without prejudice, counsel of record in this case for plaintiff will be required to state in writing on or before 3/12/84 that he has good reason to believe that plaintiff can post such a bond in a minimum amount of \$10,000 with the full understanding that, in effect, such bond will be a guarantee of payment by plaintiff



of additional costs and expenses of defendants which it is quite possible will be incurred. If plaintiff does not file a new case on or before March 12, 1984 and/or does not, through her attorney, provide this Court with the type of assurance indicated above with regard to the posting of bond, this Court, as of this date, on a tentative basis, expects to dismiss the within case with prejudice as promptly after March 12, 1984 as this Court's calendar permits. If, on the other hand, plaintiff does file a new case on or before March 12, 1984 and also provides the required assurance as to bond, this Court will afford to both sides further opportunity fully to be heard concerning whether the within case will be dismissed with prejudice or without prejudice, and if



without prejudice, in what conditions, if any.

As of this date, this Court will not enter any final Order in this case but does note, that on a binding basis, plaintiff has committed herself not to proceed further in the within case and has stated, on a binding basis, that the within case should be dismissed. Of course, if the within case is dismissed with prejudice, rather than without prejudice as plaintiff desires, plaintiff will, after a final Order to that effect is entered by this Court, have the right to appeal. By way of contrast, if this Court should enter a final Order dismissing the within case without prejudice, defendants will have such rights, if any, to appeal as may be provided by law.



Attached hereto is a letter dated February 21, 1984 to this Court from J. Frederick Motz, Esq., along with letters dated February 19, 1984 from Martin F. Whitcomb and Romaine B. Whitcomb addressed to this Court. The written comments of Ms. Meredith with respect to the same are requested on or before March 1, 1984 and of Mr. Marr on or before March 8, 1984.

The Clerk is directed to send copies of this Memorandum and Order to counsel of record and to Mr. and Mrs. Whitcomb.

It is so ORDERED, this 23rd day of February, 1984.

s/ Frank A. Kaufman
CHIEF UNITED STATES DISTRICT JUDGE



APPENDIX C-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SOUGHNIK ('SONIA') KAYZAKIAN *

V.

* CIVIL NO.

THOMAS F. KRAJEWSKI, ETC., * K-82-3141
ET AL.

ORDER

Pursuant to prior on-the-record proceedings in this case, and to this Court's February 23, 1984 Memorandum and Order, plaintiff's counsel was given the opportunity to file a new case on or before March 12, 1984, and to inform this Court, in writing, on or before March 12, 1984, whether plaintiff would post a bond in the minimum amount of \$10,000. As of March 12, 1984, plaintiff, proceeding pro se, has filed a new case, but counsel for plaintiff has not submitted any further information



with regard to posting of a bond. Accordingly, the within case is hereby dismissed with prejudice, in the light of (a) plaintiff's failure to supply the requested information as to bonding, and (b) the entire record in this case and for the reasons previously stated on the record, orally and in writing, by this Court.

It is so ORDERED, this 20th day of March, 1984.

s/ Frank A. Kaufman
CHIEF UNITED STATES DISTRICT JUDGE



APPENDIX D

[412]

THE COURT: All right. Now, this is in Kayzakian against Krajewski, Civil Number K82-3141.

I note the protective order granted by Judge Ramsey on 11/25/83. I certainly would have granted it if I had been here.

Ms. Meredith has written a letter to the Court on 12/5/83 concerning Mr. Marr's attempt to amend the complaint and reopen discovery.

I think Ms. Meredith's position is totally sound and Mr. Marr's motion to amend and reopen discovery is denied.

When Mr. Marr came into this case, he was told that there had been extensive proceedings before he came in which had involved counsel who preceded him and that I did not

Introduction

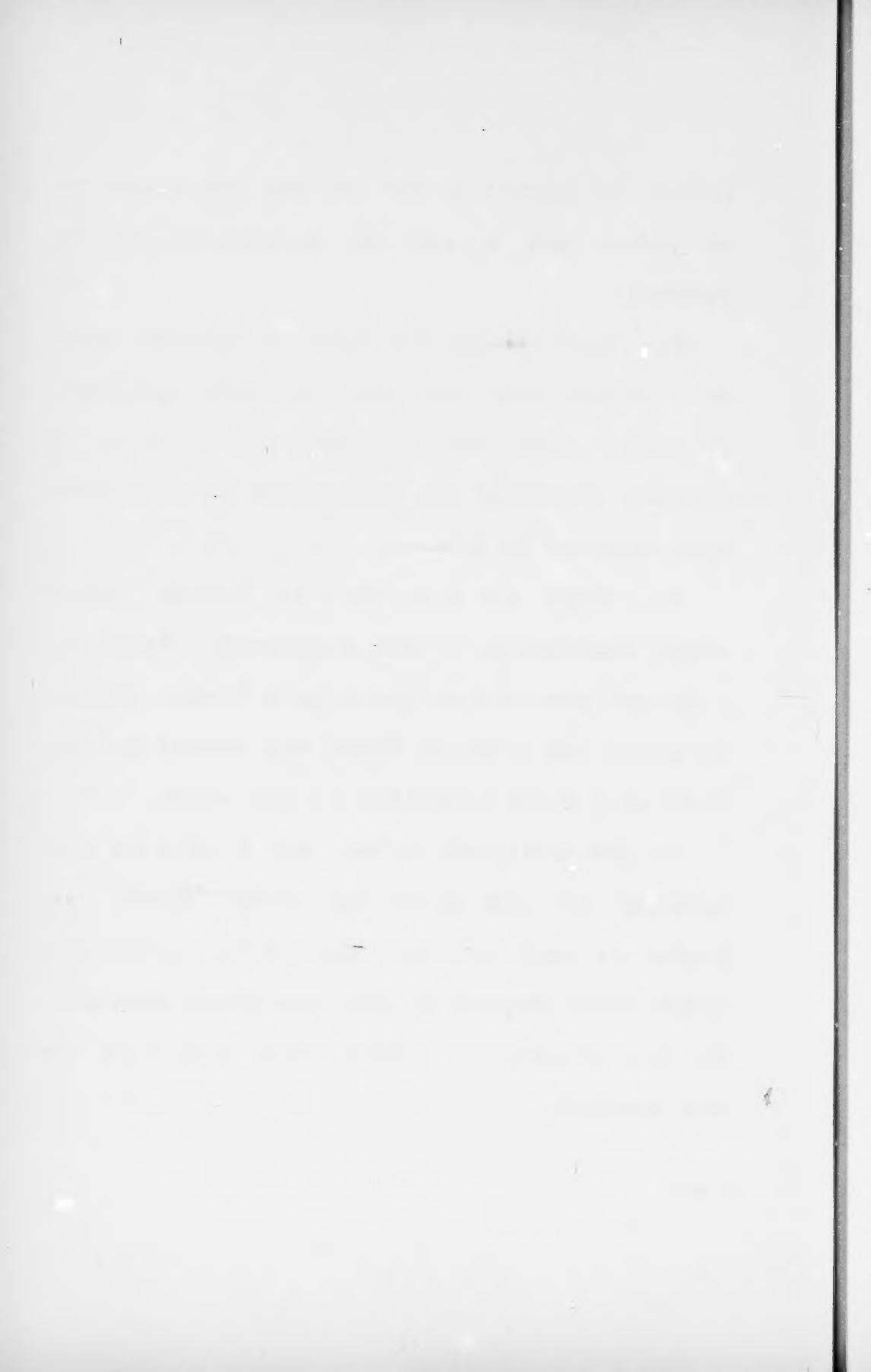
The purpose of this study is to investigate the effects of various factors on the growth and development of the human body. The study is based on a series of experiments conducted over a period of six months. The subjects of the study were a group of young adults, both male and female, who were selected for their health and vitality. The experiments were designed to measure the rate of growth and development of the body, and to determine the factors which influence this process. The results of the study show that there are a number of factors which influence the growth and development of the human body. These factors include age, sex, and the amount of exercise and food which the body receives. The study also shows that the rate of growth and development of the body is highest in the young and lowest in the old. The study is of great importance, as it provides a basis for understanding the factors which influence the growth and development of the human body. This knowledge is essential for the development of effective methods of promoting health and vitality.

expect to permit a lot of new positions to be taken and a lot of extensions to be granted.

Mr. Marr seems to have forgotten that many times and has been already granted, frankly, much more leeway than [413] I believe probably in retrospect should have been granted to him.

Mr. Marr in his 12/5/83 letter talks about amendments to the pleadings. Frankly, I do not even think there is a formal motion to amend but I would treat the formal motion just as I have indicated in any event.

In the pretrial order, and I note we are already at the pretrial order stage, at pages 14 and 15, Mr. Marr sets forth his views with regard to the amendment required by the pleadings. Well, the complaint is not amended.



* * * *

[424]

THE COURT: The point is that if I understood it from the start, what Dr. Kayzakian was saying was that she [425] made certain complaints and she stated certain opinions with regard to the kind of treatment that was given to patients and that she was retaliated against because she did make these criticisms and statements and so forth.

MR. MARR: Correct, Your Honor. I'd only add the phrase "treatment and lack of treatment."

THE COURT: All right, I would buy that.

MR. MARR: All right.

THE COURT: Now, the only relevance that I can see in the physical conditions that you have -- that have been referred to by



Ms. Meredith as being in the realm of possible evidence that you want to produce is that I do not see how such evidence would be relevant or material in the slightest unless it related to complaints made by Dr. Kayzakian and alleged retaliation for such complaints.

Now, if there is any other relevance and materiality in such evidence, relevancy or materiality in such evidence, you can tell me. Otherwise, I think Ms. Meredith is right.

MR. MARR: Well, I think that it would be relevant for the jury to understand the general background and conditions in which she was working and her efforts in regard to improving patient care. I think it would be relevant in that sense also.



THE COURT: No, I do not think that this -- this [426] is not a case in which Dr. Kayzakian has alleged wrongful discharge. This is a case in which Dr. Kayzakian has complained that she has been discriminated against.

Unless she is complaining that she was discriminated against because of something that she said in connection with those conditions, the answer is that I will grant that motion in limine.

MR. MARR: Well, Your Honor --

THE COURT: Let's move, Mr. Marr.

MR. MARR: Okay, but you've overlooked a very important detail that's in the record that I want to bring your attention to.

THE COURT: What is that?

MR. MARR: Suit was filed before she terminated her employment at Springfield and



one of the things she wants to do is amend her suit to include her forced termination as a retaliation.

THE COURT: And the answer is that that motion to amend has been denied.

MR. MARR: I understand that, Judge, but I just wanted to put everything in context.

THE COURT: If you want to bring a separate lawsuit with regard to those matters, I think Ms. Meredith, you have to understand that those would not be res judicata.

If you do not want them in this lawsuit because, [427] as you have pointed out, bringing them in will lead to another round of discovery, will lead to longer -- will lead to trial delay and so forth, I think I have to go along with you.

But those are allegations which, as you



point out, have not been stated in the case by Mr. Marr.

And, Mr. Marr, obviously you cannot bring in evidence, in support of the amended complaint, of something that would be in an amended complaint if the amended complaint is not being permitted to be filed and if the evidence is not in support of allegations that are in the complaint that is before the Court.

MR. MARR: Your Honor, the problem is those things happened after the complaint was filed. That's why they're not in the complaint.

THE COURT: And when did she leave the employ?

MR. MARR: She left the employ August-- well, actually she didn't go back to work after her examination on the 11th and 12th.



THE COURT: Of what?

MR. MARR: Of July 1983, but the complaint was filed in 1982, I believe in --

THE COURT: Yes, I know, and you have had plenty of opportunity between July '83 and December or late November or early December of 1983 to seek to amend the complaint.

[428]

MR. MARR: I did that and the Court said no in a phone conference.

THE COURT: You did that -- that phone conference took place in November, did it not?

MR. MARR: Your Honor, I don't remember the date, I'd have to check my records, but I think it was earlier than November. I think it was back in September.

MS. MEREDITH: In October.

MR. MARR: Well, whenever it was.



THE COURT: No, it makes a lot of difference. We will tell you when it was in a second.

MR. MARR: Okay.

MS. MEREDITH: It was October 17th, Your Honor.

THE COURT: All right, and I said no on October 17th for the same reason I am saying no again now.

The answer is that this case has had enough ups and downs and I told you when you came in, Mr. Marr, that we were not going to have this kind of a performance.

So the answer is that the motion in limine with regard to those physical conditions is going to be granted.

* * * *

[441]

MS. MEREDITH: Yes, Your Honor.



The next one concerns evidence about patients other than Bernard Finkelstein and Igor Frank, who are the two patients that were referenced in the complaint.

THE COURT: Mr. Marr, unless you tie them in in some way, you cannot get into them.

MR. MARR: Well, I intend to tie them in, Your Honor.

THE COURT: How are you going to tie them in?

MR. MARR: It's similar act evidence.

THE COURT: The answer is no. It is not similar act evidence whatsoever. You are making allegations of discrimination --

MR. MARR: Well, may I correct my statement, Judge? What I mean is that it wasn't just because of these two patients about which Dr. Kayzakian complained. We contend the proof will show she complained about a



number of patients whom she considered to be improperly treated and in effect was a thorn in the side of the physicians and in an effort to silence her, they engaged in this campaign of harassment.

MS. MEREDITH: Your Honor, that's an attempt to amend the complaint.

[442]

MR. MARR: No.

THE COURT: Exactly. That is an attempt to amend the complaint through the back door or side door and the answer is no.

That is exactly what you wanted to do when you asked to amend the complaint. That is the same amendment proposal over again. Let's stop trying to have end runs, Mr. Marr.

Next, Ms. Meredith.



APPENDIX E

[454] THE COURT: Now, there are a number of motions before the Court, one of which is a summary judgment motion and Mr. Marr is going to submit an affidavit, I believe, or certainly he is going to have to do something in connection with the pending summary judgment motion.

I think I ruled on just about everything else that is open, except that with regard to the pretrial evidentiary rulings, I think that I expressed only tentative views and I will finalize them at the time of the hearing.

I will also put on the record at that time that I have denied Mr. Marr's motion to amend the complaint and to reopen discovery and that I did that the other day on the



record when we last talked, which was on the
9th of December.



APPENDIX F

[563]

THE COURT: Okay.

Now, with regard to the next point, defendants seek to exclude evidence concerning Springfield patients other than Finkelstein and Frank.

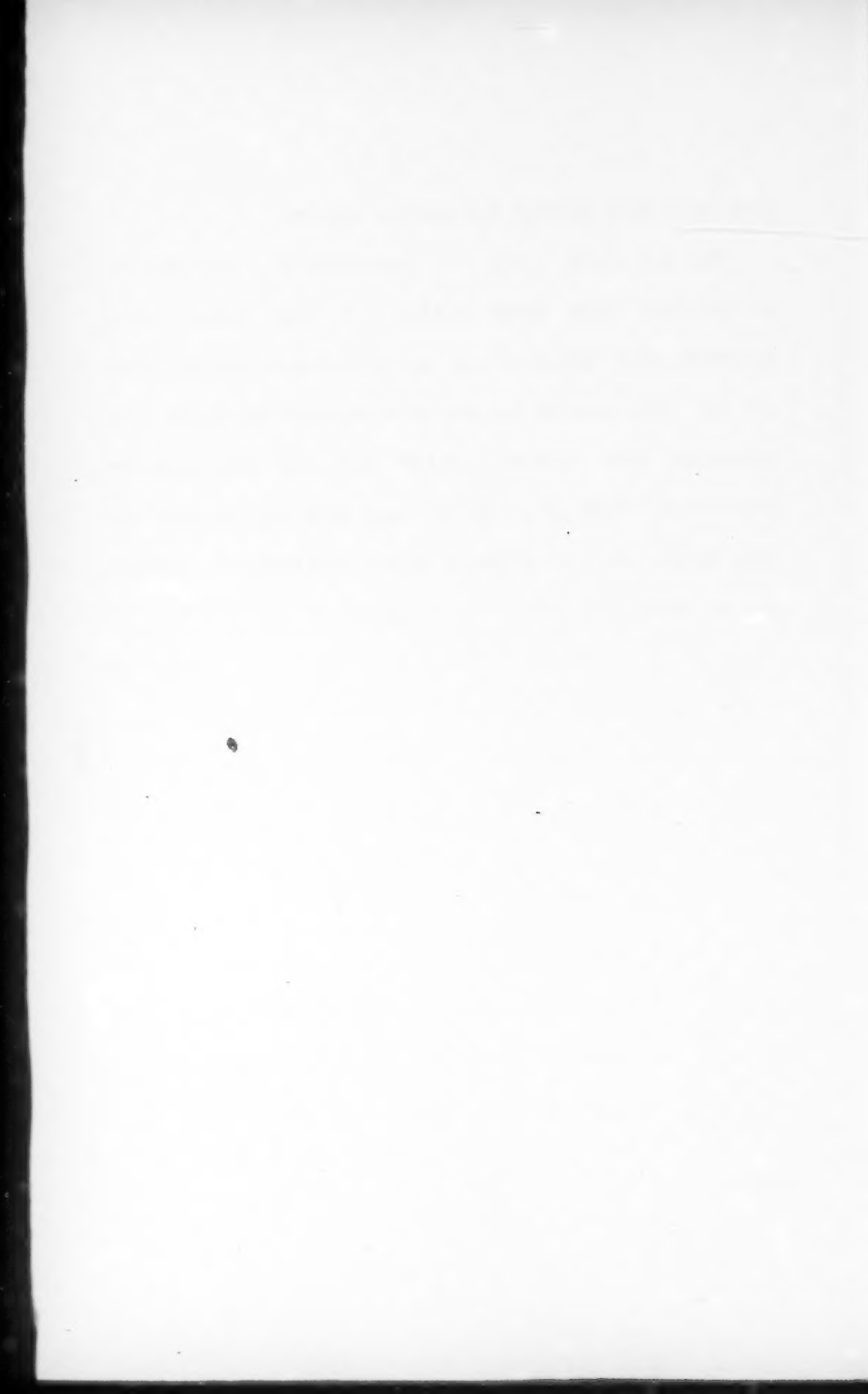
Now, there, this goes to Mr. Marr's attempt to amend the pleadings to show generally bad conditions at Springfield and I said on December 9, 1983 and December 12, 1983 that plaintiff could not amend and I ruled that way and therefore the motion in limine as to the evidence in this category is granted.

There are not going to be any more amendments. When you came into the case, Mr. Marr, I gave you liberal opportunity following in the footsteps of other counsel and



you are not going to amend again.

It is not fair. Discovery, extensive discovery has been held, it has been concluded and this case is reaching trial and it is not going to go off again because new avenues are opened, with all of the opportunities that plaintiff has had up to now to say what -- to allege that plaintiff wanted to allege.



APPENDIX G

[217] MS. MUGANE: Yes, sir, if I might.

I'm a sole practitioner and the demands of my practice are such that it is very difficult for me to keep pace with this particular case and I am seeking to replace myself.

THE COURT: I will not permit you at this point to replace yourself. You can get additional help, if you want, but you had better look at Local Rule Three of our court, which is pretty much in line with rules, I think, of its type around the country in federal and state courts.

[218]

And at this time, Ms. Mugane, having bit this case off, I am afraid you are too far along to talk about getting out of it.



MS. MUGANE: Yes, sir, I would not even file a motion to withdraw my appearance unless there was someone who was fully able to replace me.

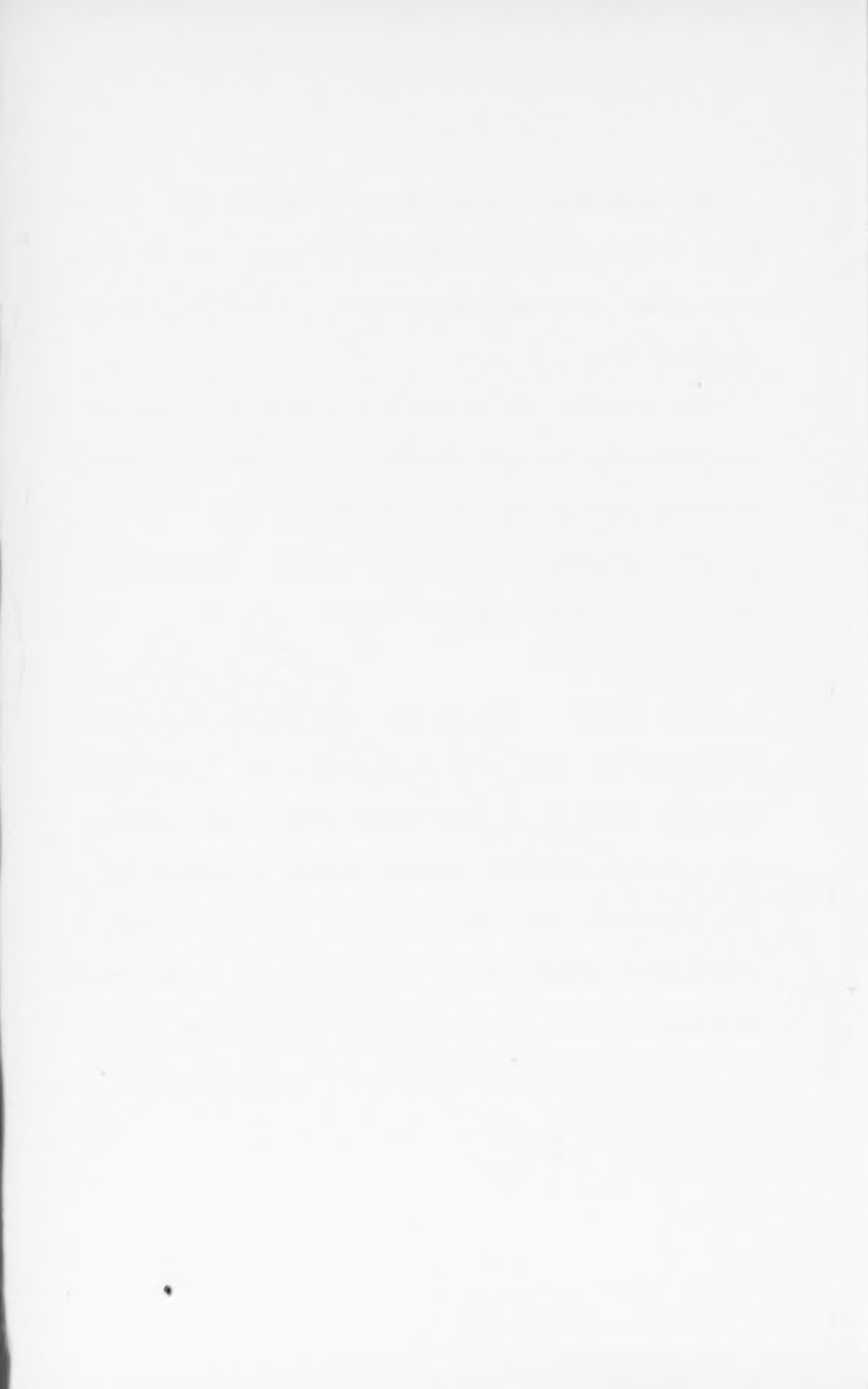
THE COURT: Even then I would not, so you understand, in all probability in this kind of case permit you to get out.

MS. MUGANE: Uh-huh. Mr. Lamasa, I believe, would also stay in the case, incidentally.

THE COURT: He would be under the same restriction as you, though he is local counsel and you have been the lead counsel up to now and if other local counsel came in, I might well permit him to retire but I certainly would not until I was quite well satisfied with the status of the case.

MR. LAMASA: Judge, may I say something?

THE COURT: Yes.



MR. LAMASA: It's the sort of situation where I don't think there's going to be any objection from Dr. Kayzakian.



APPENDIX H

[688]

MR. MARR: . . .

I also discussed with Ms. Meredith what my instructions were from my client and that was that she felt that the particular complaint that is before Your Honor now was deficient in many respects -- by that I don't mean legally deficient, Your Honor-- was deficient in many respects in terms of the situation that it was describing.

She indicated to me that --

THE COURT: Of course, she had an opportunity to read that for many, many months. In fact, how long have you been in the case, Mr. Marr? When did you enter the case?

MS. MEREDITH: July.

THE COURT: Of what year?



MS. MEREDITH: Of 1983.

THE COURT: And before that there was another attorney in the case.

MR. MARR: Yes, Your Honor.

THE COURT: And you filed an amended complaint with the Court. I do not know whether it was opposed or not but you filed an amended complaint.

I think it was opposed, was it not?

MS. MEREDITH: No, there was no amendment that was filed early on that was not opposed, Your Honor.

THE COURT: And then another one when Mr. Marr came in?

[689]

MS. MEREDITH: Right, he tried to file an amendment and it was opposed and it was denied, Your Honor.



THE COURT: I still let the amendment be made.

MR. MARR: No, Your Honor.

THE COURT: Yes, I did originally, did I not?

MR. MARR: No.

MS. MEREDITH: Not since Mr. Marr has been in the case, Your Honor.

MR. MARR: You have not let me amend the case. I have tried to amend it several times.

THE COURT: Yes, you tried. All right, I know what you mean. No, you are quite right.

I said that we had already permitted the amendment to the complaint and when you came in and I let the other attorney out, the record will show that it was with the



specific understanding that you were going to take over and move the case.

MR. MARR: That's correct.

THE COURT: Then after you got in the case and had your foot in the door, then you wanted to amend further and I said no, the case had gone too far and we had had too many proceedings. You are quite right.

MR. MARR: Your Honor --

THE COURT: I stick to that view and I still think the ruling was correct.

[690]

MR. MARR: All right, Your Honor, if I may --

THE COURT: Let's move along, Mr. Marr.

MR. MARR: I'm trying to move along.

THE COURT: We have 20 minutes.

MR. MARR: Your Honor, I'm trying to move.



THE COURT: We have 20 minutes, Mr. Marr.

MR. MARR: All right. Your Honor, Dr. Kayzakian advised me that on May 13th, 1983, her then counsel, Bridget Mugane, attempted to amend the pleadings to reflect certain things and add defendants as a result of things that occurred after the date of the filing of the suit.

THE COURT: You will find that most-- that is not my recollection.

It is yours, Ms. Meredith?

MS. MEREDITH: Definitely not, Your Honor.

THE COURT: As a matter of fact, I allowed an amendment to be made and you will find it in the record.

Let's move, Mr. Marr.

MR. MARR: Your Honor, the point I'm trying to make is this, that --



THE COURT: I am not going to reexamine the rulings that I made --

MR. MARR: I'm not asking you to do that, Judge.

THE COURT: -- in the past.

MR. MARR: I'm not asking you to do that.

[691]

THE COURT: So let's get to the point.

MR. MARR: Your Honor, there are six additional defendants who should be named in this case, not in this case in connection with an amendment. You have ruled that there will be no amendment and I'm not trying to get you to change your mind on that.

THE COURT: That was something that could have been taken care of long since.

The first mention of six additional defendants in this case was when, Ms.



Meredith?

MR. MARR: Today.

MS. MEREDITH: Yes, today, Your Honor.
This is the first time I've heard of six.

MR. MARR: There was mention of four.

THE COURT: When were any additional
defendants mentioned the first time?

MS. MEREDITH: After the discovery
deadline had expired. I believe it was in
November.

THE COURT: Of this year, long after Mr.
Marr was in the case.

MS. MEREDITH: Yes, Your Honor.

THE COURT: He wanted to bring in
additional defendants. Prior counsel at no
time asked to bring in an additional defen-
dant.

Prior counsel did seek further amendments
and at [692] that time I did rule, I think

the second time round, that there could be no more amendments, but the first time round, I allowed them.

This business about additional defendants was brought to this Court's attention after the discovery deadline had expired.

MR. MARR: Well --

THE COURT: Go ahead, Mr. Marr.

MR. MARR: -- Your Honor, this case was on a very fast track, if the Court please.

THE COURT: When was it filed?

MR. MARR: October, I believe, of '82.

THE COURT: That is hardly a fast track.

MR. MARR: Well, it's about a year and a half, Your Honor, since --

THE COURT: That is a very slow track in this court. . . .

MR. MARR: Your Honor --

THE COURT: Now, let's move on, Mr. Marr.

MR. MARR: All right.

THE COURT: We are wasting time.

MR. MARR: All right, I'm trying to move on, Your Honor.

In my opinion, this type of -- this complaint is deficient, as I indicated to the Court, not legally but deficient in terms of telling the entire situation involving Dr. Kayzakian.

[694]

She was complaining not just about Finkelstein and Frank. She was complaining about conditions in the hospital. She was complaining about the treatment or lack thereof and abuse thereof of at least 35 other patients.

And she asked previous counsel to add this to the suit. Previous counsel did not add it to the suit.



She feels as though at this particular juncture she cannot present a fair picture, bringing justice to her and indeed to all of the defendants, including others, Your Honor, without restructuring the suit in the form of a different lawsuit.

THE COURT: There is nothing you are telling me now you did not tell Ms. Meredith and me in November except the different lawsuit. Everything you have said up to now is total repetition.

MR. MARR: Well --

THE COURT: The answer is you got in this case last July. I told your client in your presence and in the presence of retiring counsel to get the case in shape and move it along, that it had already lagged on too long last July, in this Court's judgment, and that I was not having it lag further.



What was the date the case was filed?

MR. MARR: October of '82, and in October of '83, I sought to have the case amended at that time.

[695]

THE COURT: You had plenty of time to do it when you came in the case in July. You did not seek to have an amendment with regard to defendants until November.

MR. MARR: I thought it was October, Your Honor.

THE COURT: You will find that it was November.

Is that right, Ms. Meredith?

MS. MEREDITH: I believe so. I don't have my correspondence.

THE COURT: Let's assume it was October. It is still too late.

MR. MARR: Well --



THE COURT: Now, Mr. Marr, the answer is let's get to it.

MR. MARR: Well, Your Honor --

THE COURT: Up to now, you have done nothing except to repeat and reargue what I have heard in full from you and prior counsel before.

Now, sir, you have got a couple of minutes --

MR. MARR: Well --

THE COURT: -- to come to something that is not repetition and if you do not, I will not hear from you further.

* * * *

[695]

MR. MARR: Your Honor, what the plaintiff would like to do in this case is to file a lawsuit against the present defendants as well as six others, this is a new lawsuit,



alleging some of the facts that have been alleged in [696] this lawsuit as well as a plethora of other facts.

THE COURT: She may do so. Nobody is preventing her from filing another case.

MR. MARR: Well, I understand that, Your Honor, and what she would like to do is consolidate that case with this case, as indeed there's an obligation for plaintiff and indeed the representative of the plaintiff to let the Court know that there is a companion case.

THE COURT: No, not to consolidate it.

MR. MARR: No, to let you know there's a companion case.

THE COURT: You only have an obligation to say it is a related case.

MR. MARR: That's correct, related in all respects. In fact, the new suit that would

1

be filed would be larger than this one.

THE COURT: All right.

MR. MARR: And to ask this Court to stay this case that is presently before it and permit the orderly discovery of the new suit and the trial of both together.

THE COURT: Mr. Marr, you are an officer of this court as well as an advocate and I know this question puts you on the spot but I am nevertheless going to ask it.

MR. MARR: That's all right.

THE COURT: Are you as an officer of this court [697] asking this Court to do what you are now asking it to do because as an officer of this court you think it is appropriate, or are you doing it simply because your client has asked and instructed you to do it?



MR. MARR: Your Honor, I think it's appropriate and I'm saying that as an officer of the court.

THE COURT: I do not understand how you even get in the ball park on that.

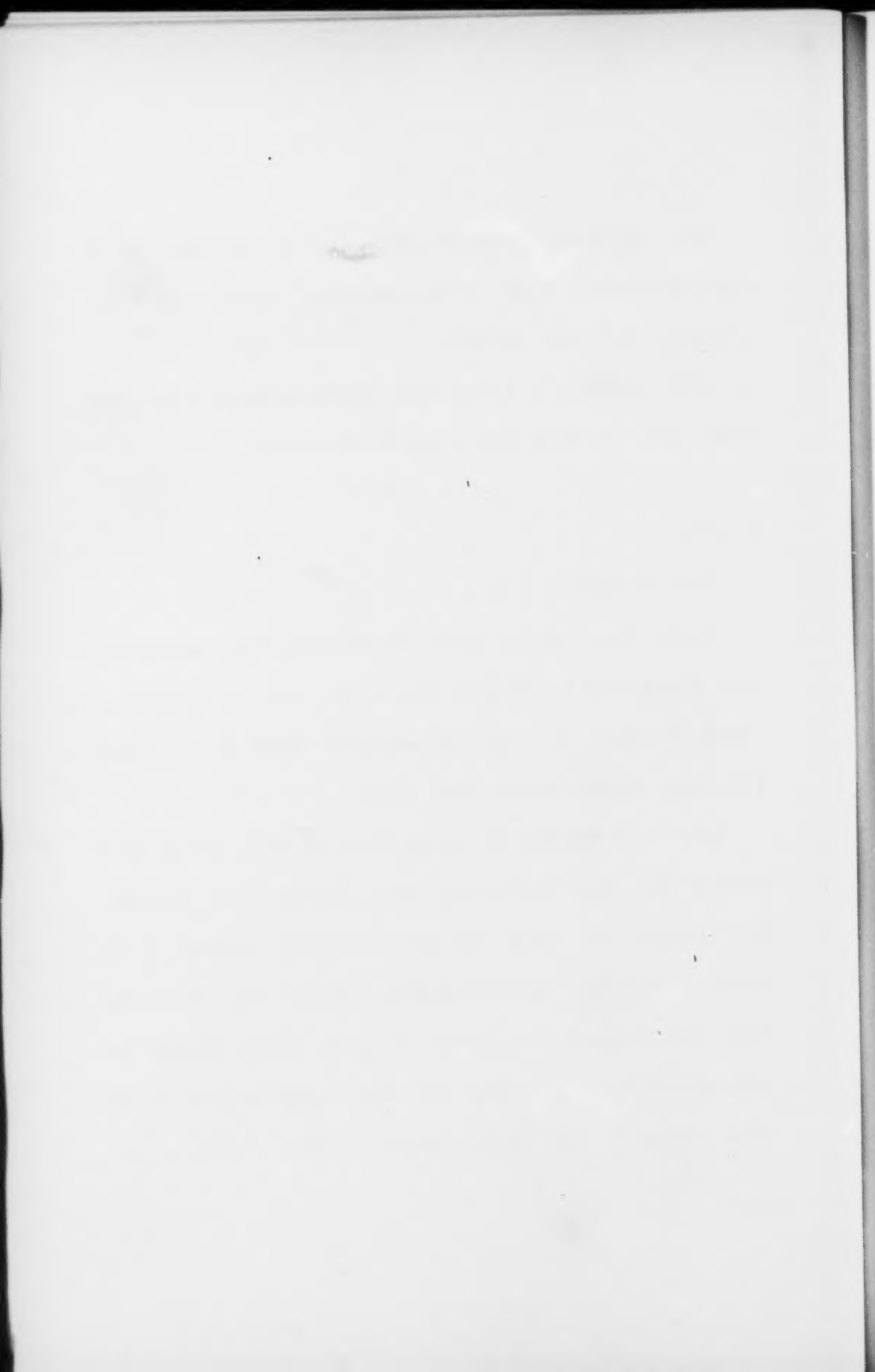
* * * *

[707]

THE COURT: . . .

Now, the only justification for seeking the dismissal, quite frankly, is to avoid-- and I put it on no other basis -- the rulings this Court has made.

Now, if those rulings are wrong, if I was wrong in not letting Dr. Kayzakian amend, Mr. Marr, at one or more [708] times, you will have an opportunity, sir, if you are not satisfied -- your client will have an opportunity, if she is not satisfied with the result of this case after trial, to



appeal and to challenge this Court's rulings.

But those rulings have been made and reconfirmed and the only reason you want to file a new case is that you want to bring into this case new defendants and new allegations that have not been brought up, in this Court's opinion, on a timely basis, and that is the long and short of it.

Now, if the plaintiff has a new case which would not be barred in whole or in part -- let me start that sentence again.

If the plaintiff files a new case in which she makes allegations which are not barred in whole or in part against one or more defendants by the doctrine of res judicata, collateral estoppel or by anything else, the plaintiff will have her opportunity fully to present such a case.



And she can bring the case and it will be a related case and the case will undoubtedly be assigned to me and I would have little question at this point that if there were a motion made to disqualify which was not joined in by the defendants, I would not grant the motion.

You will find that the case law is rather clear that -- there is not a lot of case law but what case law [709] there is indicates that the successor case is not different than the earlier case.

And I haven't the slightest idea, Mr. Marr -- and I think you know this very well as an officer of the court or you have just as firm a conviction on this as I do and I think Ms. Meredith knows this -- I haven't the slightest idea who is right or wrong on the merits in this case.



I made it clear to the state from the start, from the word "go," that if Dr. Kayzakian was discharged on the basis that she alleged, she had a cause of action, and I required the state to proceed promptly and I protected Dr. Kayzakian in terms of her position at the hospital at times when the state had a fit, to put it quite mildly and in language of the street that everybody understands, in terms of the conditions that were imposed.

And I do not know whether Dr. Kayzakian is right or wrong and I haven't got the slightest idea whether she would be right or wrong in this case or in another case.

But in this case, there is a jury trial anyhow and it is down to damages and I haven't got -- this will be up to the jury and if I do not conduct the trial on a fair,

impartial basis, Dr. Kayzakian once again, if she is not satisfied with the result in this case or any other case, can file an appeal.

* * * *

[708]

THE COURT: . . .

And she can bring the case and it will be a related case and the case will undoubtedly be assigned to me and I would have little question at this point if there were a motion made to disqualify which was not joined in by the defendants, I would not grant the motion.

* * * *

[713]

THE COURT: . . .

Now, Mr. Marr, you have raised questions in this case about the plaintiff's financial

status. Indeed there is a motion pending before the Court to permit the plaintiff to subpoena witnesses and so forth in forma pauperis, and that was one of the matters we were going to get to Friday and/or yesterday if we had not gotten to the disqualification [714] problem and the dismissal problem.

We got to the dismissal problem first and discussed it, then you told me about disqualification yesterday at the end of the discussion. Immediately when you mentioned disqualification, I said we would have this hearing today.

Is that correct?

MR. MARR: That's correct, Your Honor.

* * * *

[714]

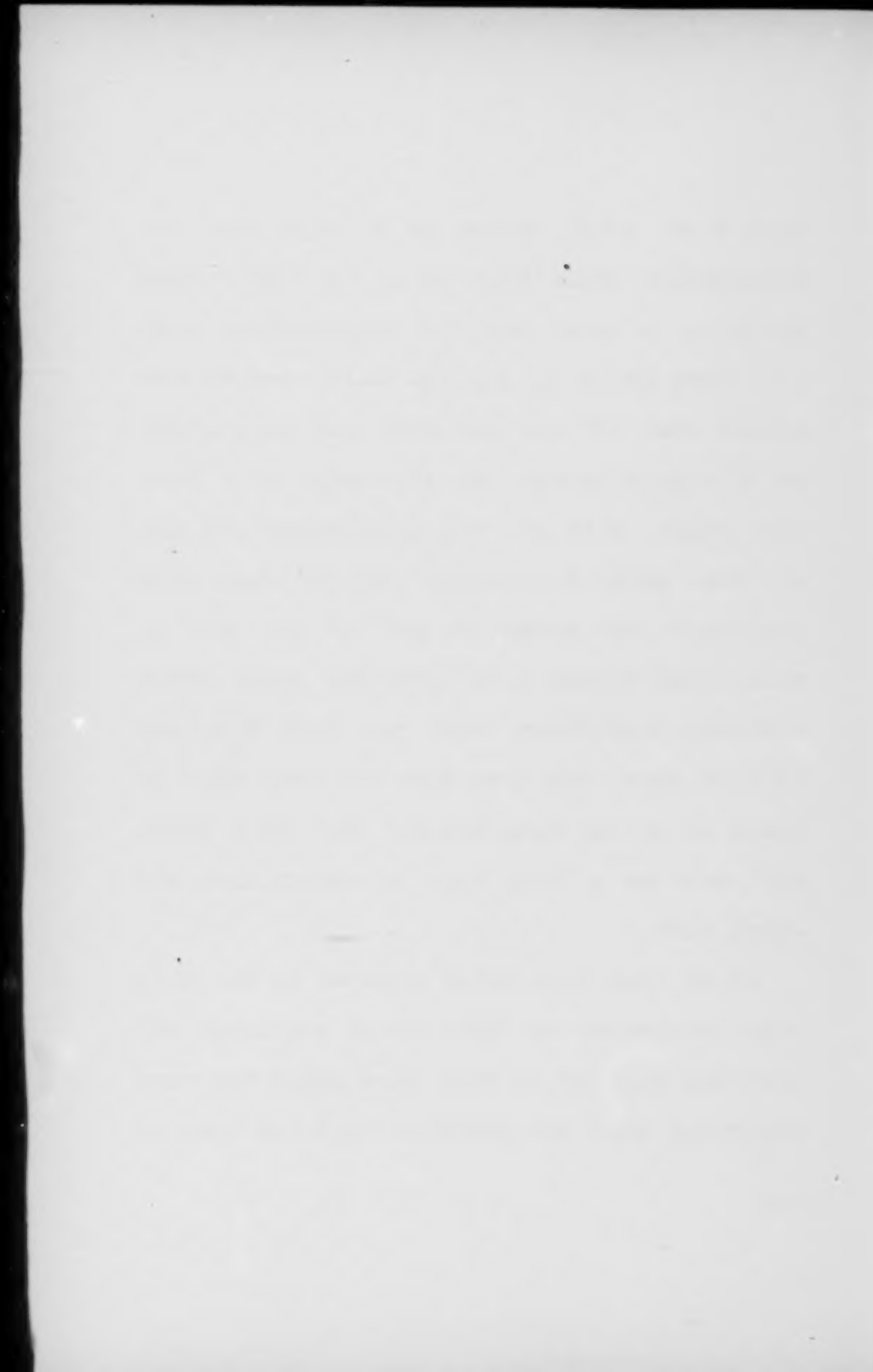
THE COURT: . . .

Now, I have little question about the



fact that [715] there is a good deal of preparation time that will be lost, that there is a good deal of duplication that will come about in any new suit, and to the extent that if the new suit had been filed on a timely basis, as it could well have been filed, with all the allegations and all of the party-defendants in it that the plaintiff now seeks to put in it, put in this case would have involved just about probably everything that has been involved in this case, but that does not mean that if there is a new case brought now, that there will not be a good deal of repetition and extra cost.

At no time have prior counsel or Mr. Marr ever indicated to this Court anything new that has come up in this case since the very beginning that the plaintiff did not know or



should not have known and did not know-- did not either tell her attorneys or could have told her attorneys with regard to what went on at the hospital.

The plaintiff stopped working at the hospital when, Ms. Meredith?

MS. MEREDITH: August, Your Honor, of 1983.

THE COURT: August 1983. Everything that I have heard that she wants to name as a defendant -- excuse me -- everything she wants to complain about against anybody, a defendant in this case or anyone else, are matters that she [716] knew about long before she stopped working there. She had every opportunity to bring the information to the Court's attention.

It was not that there was a new person who did something either by way of retalia-



tion, deprival of any of her constitutional or statutory rights or anything else that has to do with this case -- I have lost track of my sentence structure, but new things were not pointed out to this Court.

And one of the reasons why I denied the motions to amend was because they were matters that could have easily been brought up long before and they were either -- and they were cumulative kind of matters in addition.

Now, I have seen enough in this case to know that there is more than enough that the plaintiff can bring forward in this case to go forward in it if she wants to do it. She simply wants to get around the Court's rulings that have been made in this case at this time.



Now, I think at a minimum the plaintiff is going to have to pay the extra expenses the defendants will incur and I would require some kind of a bond or cash deposit in that regard before I would dismiss without prejudice.

I think that Rule 41(b) dismissal should be ordered only in the face of a clear record of delay or contumacious conduct by the plaintiff, and I quote from *Durham v. Florida East Coast Railway Co.*, 385 F.2d 366, 368, [717] Fifth Circuit, 1967, or upon a serious showing of wilful default, and I point to the *Gill* case in 240 F.2d 669, 670, Second Circuit, 1957.

I think there are cases where there is less reason to refuse to dismiss without prejudice than this case right on this record now, many cases, and I have no

The first of these is the fact that the
 government has been unable to secure
 the necessary funds to carry out its
 policy of non-interference in the
 internal affairs of the country.

The second is the fact that the
 government has been unable to secure
 the necessary funds to carry out its
 policy of non-interference in the
 internal affairs of the country.

The third is the fact that the
 government has been unable to secure
 the necessary funds to carry out its
 policy of non-interference in the
 internal affairs of the country.

question I could exercise discretion to deny without condition the motion to dismiss without prejudice and to say that any dismissal would be with prejudice.

But I frankly think that this is a case in which this is a plaintiff who, as far as I can see, is just totally consumed by this case.

I have no question that the plaintiff honestly thinks in this case that she has been discriminated against and had her rights taken away from her. I have no question that she ought to have a right to have her day in court in this case.

* * * *

[717]

THE COURT: . . .

But I think that the plaintiff is a plaintiff who has not given, despite the

tremendous amount of time that her prior counsel spent on this case and the just volumes of time that Mr. Marr has spent on this case, has seemingly not brought everything on a timely basis to the attention of her counsel.

* * * *

[718]

THE COURT: . . .

Under those circumstances, I am going to -- the motion to dismiss without prejudice will be denied, unless the plaintiff wants to post a very sizable bond in this case or a sizable amount of cash.

If she is not able to do it -- and I gather from what you have proffered with regard to her financial condition, she cannot do it or you would not be asking to proceed in forma pauperis, Mr. Marr -- I am



afraid that that does not affect the Court's reasoning, for the reasons that I have given.

Talk to your client quickly and tell me what you want to do.

(Discussion off record between Mr. Marr and Plaintiff Kayzakian.)

THE COURT: No, I also said, Mr. Marr, that if there was something more you wanted to say, I would hear from you. If there is nothing new you have to add, you do not have to add anything.

Talk to your client and then say anything you want to say by way of argument or by way of response to what I have just said or what your position is.

(Discussion off record between Mr. Marr and Plaintiff Kayzakian.)



THE COURT: Now, if your client is interested and [719] is able to arrange with someone to put up the proper amount of bond, I will listen to Ms. Meredith and go into the question of how much.

MR. MARR: Your Honor, I think before the plaintiff can really realistically make a judgment, she'd really need to know what the Court is talking about in terms of --

THE COURT: Mr. Marr, your client says that she is so indigent that she cannot take care of paying the cost to summons witnesses, which is not very great.

Now, if your proffer is made in good faith on that, unless your client has someone who is going to put these funds up, then there is no sense of this Court taking any more of its valuable time.



And it has spent a fortune of time in this case. It is not only counsel and the parties who have spent it.

MR. MARR: Whether or not, Your Honor, such a bond could be posted would depend upon the amount.

THE COURT: Mr. Marr, if she cannot post --

MR. MARR: No, it's not --

THE COURT: Unless she has some source of funds --

MR. MARR: Well, Your Honor, I can tell you this, that from time to time people have assisted the plaintiff --

THE COURT: How much --

MR. MARR: -- in giving her money --

THE COURT: All right, Ms. Meredith --

[720]

MR. MARR: -- for depositions and things

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like that.

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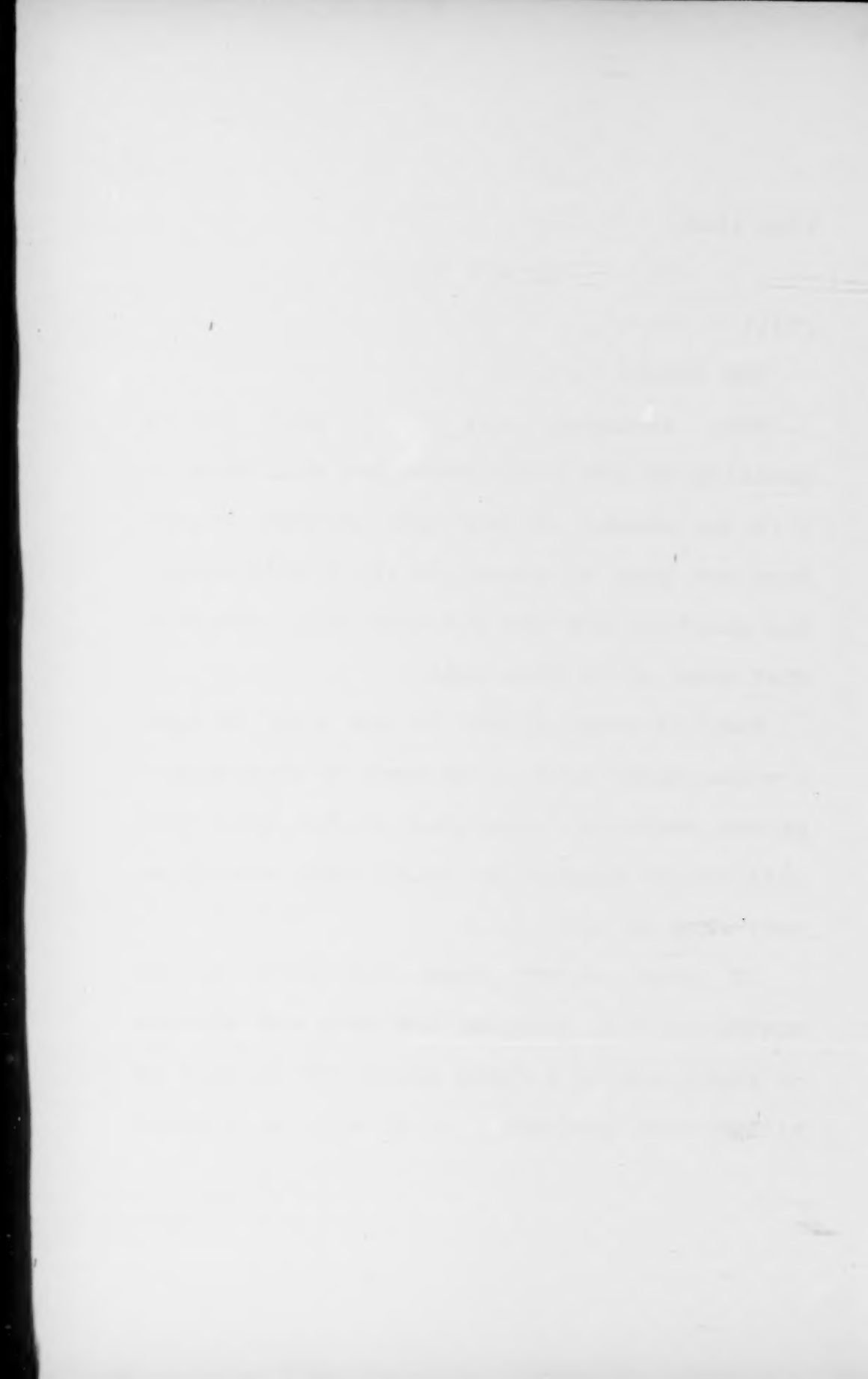
[731]

THE COURT: . . .

Now, assuming your -- I will put a question to you [732] which you will have to give an answer to now and if your client does not give an answer to it, I will answer the question for her and that will determine what goes on in this case.

Now, if your client is not able to post the necessary bond or in cash or with appropriate security, does your client want this case to go forward to trial next Monday or not? Yes or no?

If your client does not give me an answer, I will dismiss the case and whether -- right now on a final basis and it will be either with prejudice -- it will be without



prejudice, provided that an appropriate bond, the amount of which I will set after I hear further from the state and the plaintiff, or if the plaintiff does not post the bond, it will be with prejudice.

Now, if your client cannot make up her mind at this point whether she wants this case to go forward next Monday, then I am not going to keep it in the trial calendar any longer and the case will be dismissed.

Whether it is with prejudice or without prejudice depends upon whether the bond is posted and also, frankly, whether the state can convince me that it should not be posted anyhow, that I should not allow a bond to be posted and that the dismissal should be with prejudice, period.

Now, I am not interested in going any further than that, Mr. Marr, and I made this



as clear to you as possible [733] yesterday on the telephone and you have had plenty of opportunity to talk to your client between yesterday, early yesterday afternoon and now.

Now, talk to your client, and we are not going to wait much longer tonight.

(Discussion off record between Mr. Marr and Plaintiff Kayzakian.)

MR. MARR: My client has just told me that she does not want this suit, as it is presently structured, to go forward.

THE COURT: Under any conditions?

(Discussion off record between Mr. Marr and Plaintiff Kayzakian.)

THE COURT: She does not want it to go forward, period?

(Discussion off record between Mr. Marr and Plaintiff Kayzakian.)

THE COURT: Mr. Marr, your client is a bright lady. I have learned enough about her abilities in this case and she would not have the kind of position and the responsibilities if she did not have pretty good brain power.

Now, let's get this --

MR. MARR: She's under tremendous pressure right now though, Your Honor --

THE COURT: This is --

[734]

MR. MARR: -- tremendous pressure.

THE COURT: Mr. Marr, I have had all I want of that kind of problem. Now, I want decisions made. You just told me your client did not want this case to go forward. That --

MR. MARR: Not the way it's presently structured, Your Honor.

1870

1. The first part of the report is devoted to a general description of the country, its position, its extent, its climate, its soil, its vegetation, its animals, and its population.

2. The second part is devoted to a description of the principal cities, towns, and villages, and to a description of the principal occupations of the people.

3. The third part is devoted to a description of the principal industries, and to a description of the principal exports and imports.

4. The fourth part is devoted to a description of the principal educational institutions, and to a description of the principal religious institutions.

5. The fifth part is devoted to a description of the principal public works, and to a description of the principal public buildings.

6. The sixth part is devoted to a description of the principal public institutions, and to a description of the principal public services.

7. The seventh part is devoted to a description of the principal public works, and to a description of the principal public buildings.

8. The eighth part is devoted to a description of the principal public institutions, and to a description of the principal public services.

9. The ninth part is devoted to a description of the principal public works, and to a description of the principal public buildings.

10. The tenth part is devoted to a description of the principal public institutions, and to a description of the principal public services.

THE COURT: In other words, if the Court will not permit it to be restructured, she does not want it to go forward; is that right?

(Discussion off record between Mr. Marr and Plaintiff Kayzakian.)

MR. MARR: That's right.

THE COURT: All right, then I will take the case out of the trial calendar and I am ruling now the case will be noted as dismissed, either with prejudice or without prejudice, depending upon conditions that have yet to be completely determined.

If your client is not able to arrange to post \$10,000, there is no sense of our spending any time going forward further with regard to the possibility of any bond or the like being posted, because the amount will not be less than \$10,000, Mr. Marr.



If your client is able to post the \$10,000, then I will have to hear two things from -- give the state the opportunity, Ms. Meredith the opportunity on behalf of her [735] clients to be heard on two things:

(1) The appropriate amount of the bond, and of course I will hear fully from the plaintiff on what the appropriate amount should be.

(2) I will hear further from the defendants and I will hear responses from you as to why I should not dismiss with prejudice, regardless of what your client will post in they way of security.

Ms. Meredith, you will have a tough time convincing me on that latter issue. It seems to me that there is no -- the only problem involved here is cost. I do not think that the extra amount of disruption



that is caused from taking this out, if we take it out tonight, should stand in the way of letting a new -- a dismissal being without prejudice.

I do not think that this Court is that put on that it should deviate from the normal standard, which is prejudice to the defendant and how to make the defendant whole.

Now, I think you are entitled to know tonight, just as this Court is, whether the case is going to trial in its present posture next Monday, because I have a calendar to take care of and your doctors have patients to see and your people who would be working to prepare for this case have other things to do, and you have other things to do and all associated with you and your clients have.

So it is only fair that we know tonight,
and I have [736] pressed for a determination
and I have not gotten that determination.

The case is not going forward next
Monday, period, exclamation point.



APPENDIX I

[752]

THE COURT: . . .

But I will certainly give Ms. Meredith an opportunity to be heard fully and your client, Dr. Kayzakian, an opportunity to be heard fully on these factual issues.

* * * *

[754]

THE COURT: . . .

Now, Mr. Marr, give me the answer. Your point that you want more time is noted and overruled.

MR. MARR: Well, what answer are you asking me for, Your Honor?

THE COURT: If your client is not able to assure this Court that she can come up with a bond --



MR. MARR: Well, Your Honor, she can't assure you.

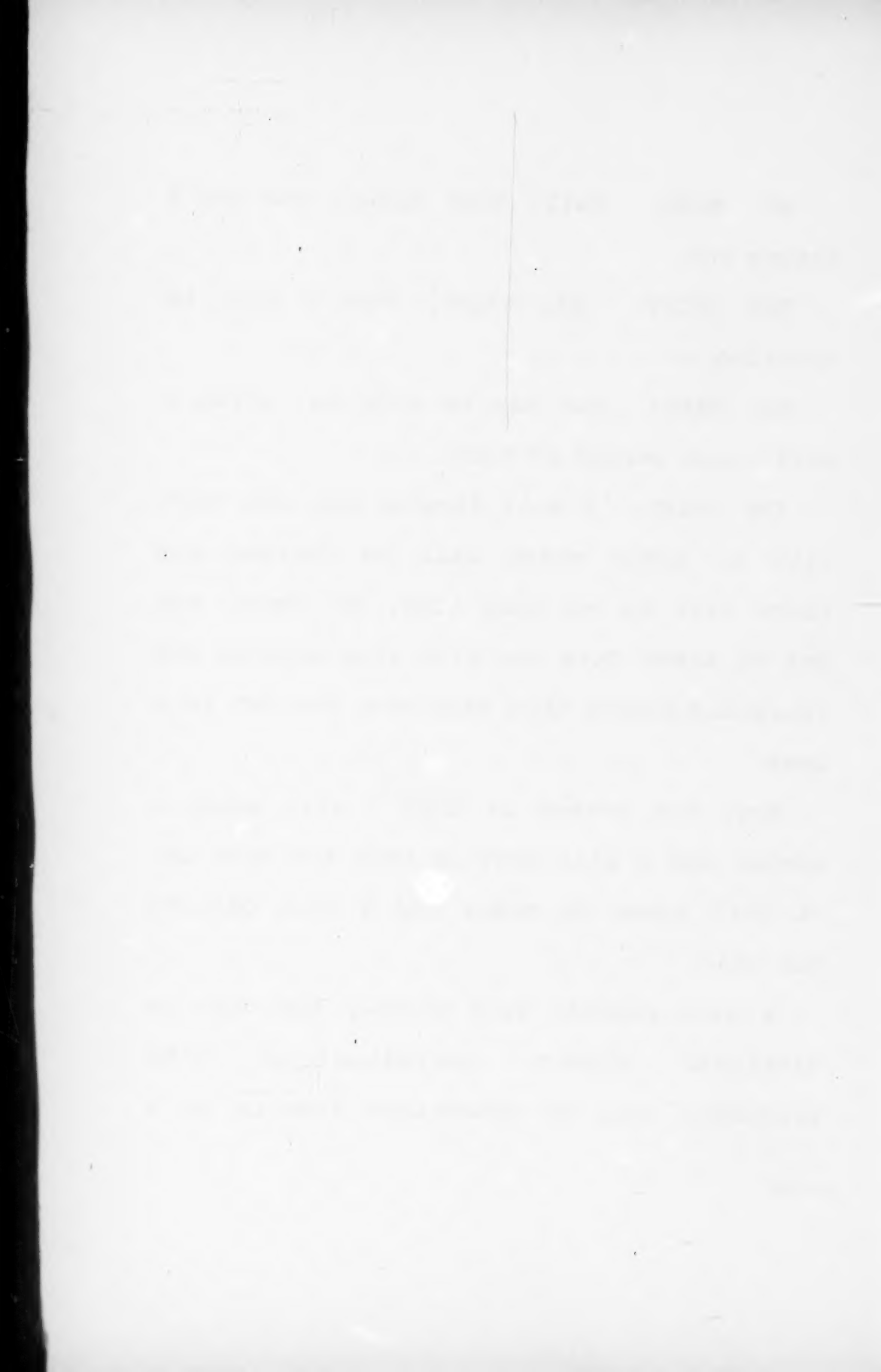
THE COURT: All right, then I will be entering --

MR. MARR: She may be able to, given a sufficient period of time.

THE COURT: I will dismiss the case then with an order which will be drafted and there will be no more time, Mr. Marr, and one of these days you will stop arguing and rearguing points that have been decided in a case.

Now, the answer is that I will enter a motion and I will provide that the case is--I will enter an order and I will dismiss the case.

I will provide that whether the case is dismissed without prejudice or with prejudice will be determined finally on a



schedule which I will establish.

No, I do not think I even have to establish a schedule. Yes, I will. I will say that Dr. Kayzakian has a reasonable period of time -- and you can tell me what you want and I will determine whether it is reasonable after I hear from you and Ms. Meredith in a minute -- a reasonable period [755] of time during which to come from and to ask this court to dismiss without prejudice, with an appropriate guarantee or bond or the like to pay the kind of costs, extra costs that Ms. Meredith alleges will be due and then I will set up a hearing in connection with the same.

Before, however -- the order will provide that before I do anything, I will have to have a detailed proffer of the arrangements for the guarantee of the bond and a reason-

able basis for believing that Dr. Kayzakian, who has applied to this court to proceed in forma pauperis, is able to post anything like \$10,000.

And \$10,000 will probably not suffice, or will not suffice if Ms. Meredith is right. I do not know whether she is right or not. It may not be \$10,000. It may be less, it may be more. Whatever it is will be determined.

But initially, I am going to have to have some kind of cause to believe that Dr. Kayzakian can come up with arrangements to guarantee the payment of at least \$10,000 if she files another suit.

Now, how long do you want for Dr. Kayzakian to have (1) to file the other suit and (2) to give this Court assurance with regard to the payment of expenses? How



long?

MR. MARR: Thirty days, Your Honor.

THE COURT: I will give the thirty days if Ms. Meredith does not object, with the understanding the case [756] will be dismissed as of the date the order is entered, which will be as soon as I have time to draft it and get it out.

The order will also provide, Ms. Meredith, that you will have an opportunity to argue to the Court that regardless of what Dr. Kayzakian can guarantee or cannot guarantee in terms of payment of expenses, that the dismissal should be with prejudice.

So in essence, for the moment -- and I think I will let the order provide this, though I have to wait until I write, w-r-i-t-e, this order and see how it looks -- but I will probably provide that the dismissal



is without prejudice at the moment but will become a dismissal with prejudice, provided that Dr. Kayzakian will have the opportunity to (1) file the suit and to (2) show the Court that it should be without prejudice.

Meanwhile, I will provide in the order that the order is not final so that Dr. Kayzakian's appeal time in connection with the order will not be cut off.

MR. MARR: Thank you, Your Honor.

THE COURT: Ms. Meredith, is that okay by you?

MS. MEREDITH: Your Honor, I think thirty days --

THE COURT: I cannot hear you.

MS. MEREDITH: I think thirty days is entirely too long, in view of the fact that you gave Mr. Marr -- you've given him break after break after break, Your Honor, and I-



[757]

THE COURT: There is no question about that, and I forgot when you told me that I said yesterday that if a new suit was filed, it would have to be on a fast track and Dr. Kayzakian's interests would be served by it being on a fast track in terms of extra costs because if Ms. Meredith is not in the case, it is obviously going to cost more for somebody else to learn the case all over again.

Under those circumstances, you have two weeks, Mr. Marr.

Is that satisfactory, Ms. Meredith?

MS. MEREDITH: Yes, Your Honor.

THE COURT: Mr. Marr, if you want to object, you can object.

MR. MARR: Well, I object.



APPENDIX J

February 23, 1984

The Honorable Frank A. Kaufman
Chief Judge
United States District Court
for the District of Maryland
101 West Lombard Street
Baltimore, MD 21201

Dear Judge Kaufman:

Enclosed herewith are the original and two copies of Plaintiff's Motion for Voluntary Dismissal Without Prejudice and supporting memorandum which you requested I file during our telephone conversation yesterday afternoon.

Sincerely,

MARR, BENNETT & CARMODY, P.A.

s/ Michael E. Marr
Michael E. Marr

MEM:nmd
Enclosures
cc: Kathleen Howard Meredith



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SOUGHNIK ('SONIA') KAYZAKIAN *

Plaintiff *

v. * CIVIL ACTION

THOMAS F. KRAJEWSKI, et al, * NO. K-82-3141

Defendants *

* * * * *

MOTION FOR VOLUNTARY DISMISSAL
WITHOUT PREJUDICE BY ORDER OF COURT

COMES NOW the Plaintiff, Sonia ("Soughnik") Kayzakian, and requests that this Honorable Court enter an Order pursuant to the provisions of Rule 41(a)(2) dismissing the above-captioned action without prejudice for the following reasons:

1. Plaintiff is seeking relief in this action, inter alia, for violation of her civil rights under the First Amendment to the United States Constitution.

2. The protected speech alleged in her Complaint does not properly reflect the protected speech which resulted in the alleged discriminatory actions against the Plaintiff.

3. Furthermore, the present Defendants and several other Defendants perpetrated acts against the Plaintiff subsequent to the filing of the Complaint in this case, which acts the Plaintiff believes were directed against her in retaliation for her exercise of free speech guaranteed by the First Amendment to the United States Constitution.

4. Plaintiff has sought to amend her Complaint repeatedly in an effort to broaden its scope, but has not been permitted to do so.

5. Plaintiff believes that the prosecution of her present Complaint,

encumbered as it is, with its limited language will deny her justice and due process.

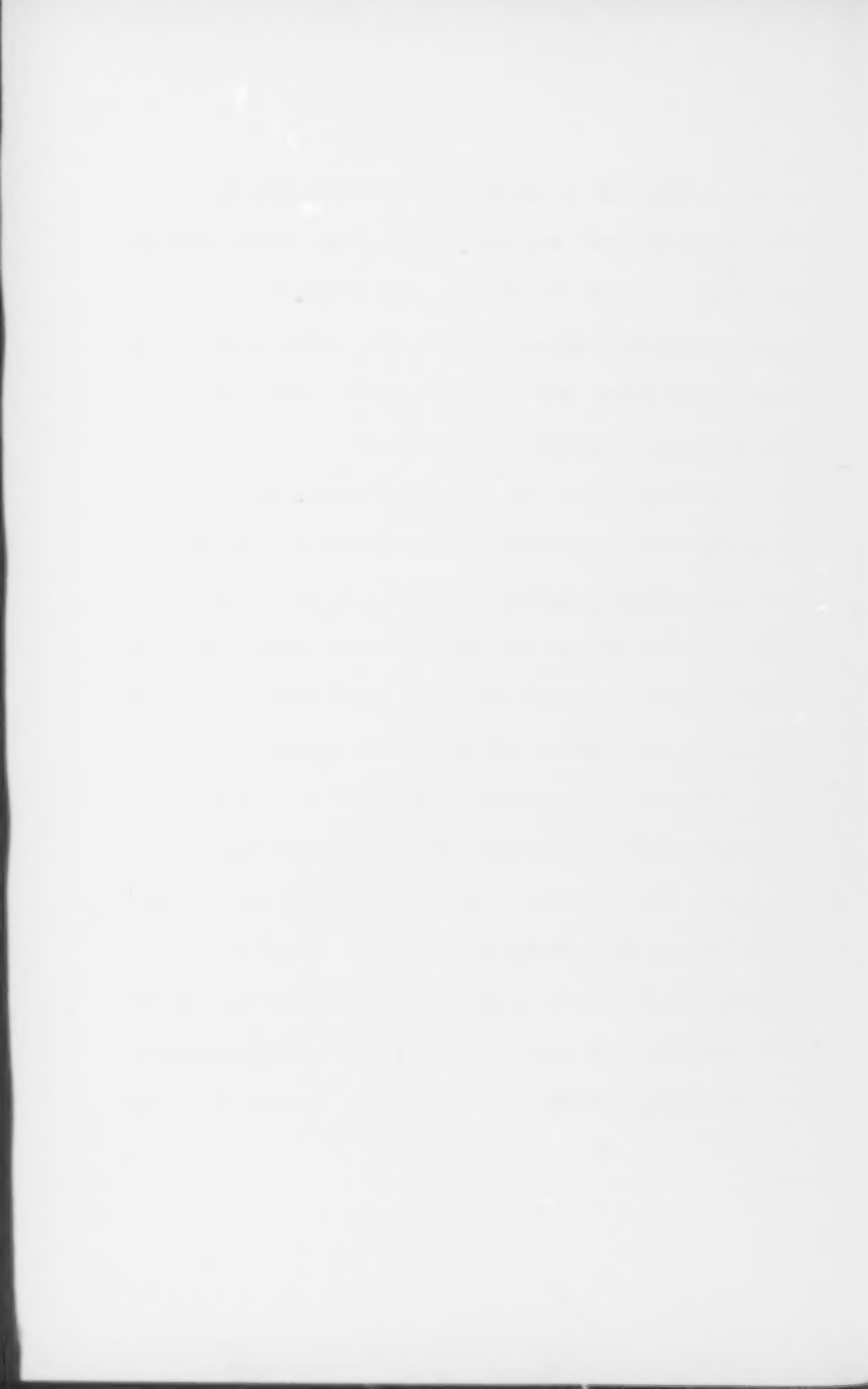
6. Plaintiff is presently without funds and is unable to determine whether or not she can comply with any of the terms and conditions that this Court deems proper; however, Plaintiff believes that this dismissal and any costs incurred by the Defendants as a result thereof will not be material nor prejudicial to the Defendants.

7. Each of the Defendants in question has had the services of counsel paid for by the State; whereas, Plaintiff has been unable to secure legal representation paid for by the State and further has been unable to secure assistance in connection with the payment of the enormous costs required to prosecute this case.



8. Should Plaintiff be successful in the pursuit of an expanded law suit which she now intends to file, whatever costs that Defendants can show would not have otherwise been incurred can be set off against any award which Plaintiff receives. Conversely, if Plaintiff is not successful in prosecuting her new and expanded law suit, the Defendants herein would be entitled not only to the award of attorneys' fees for the successful defense of the new and expanded law suit but also to such an award from the suit herein dismissed. (42 U.S.C. 1983).

WHEREFORE, Plaintiff respectfully requests that this Court enter an Order dismissing her Complaint under Rule 41(a)(2) without prejudice and with the further terms and conditions that all discovery generated in the captioned case be applicable to any



new and expanded law suit which the
Plaintiff chooses to file.

Respectfully submitted,

s/ Michael E. Marr
Michael E. Marr
MARR, BENNETT & CARMODY, P.A.
Suite 430
10 North Calvert Street
Baltimore, MD 21202
(301) 539-4250
Attorneys for the Plaintiff



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SOUGHNIK ('SONIA') KAYZAKIAN *

Plaintiff *

v.

* CIVIL ACTION

THOMAS F. KRAJEWSKI, et al, * NO. K-82-3141

Defendants *

MEMORANDUM IN SUPPORT OF MOTION FOR VOLUNTARY
DISMISSAL WITHOUT PREJUDICE BY ORDER OF COURT

Before the enactment of the Federal Rules of Civil Procedure, a plaintiff could non-suit his case in accordance with common law rule where the defendant had either answered or filed a motion for summary judgment. This practice still prevails in many state courts and is available for law actions in the State of Maryland pursuant to Rule 541(a) of the Maryland Rules of Procedure. However, since the adoption of the Federal



Rules of Civil Procedure as the Fourth Circuit observed in Piedmont Interstate Fair Ass'n v. Bean, 209 F.2d 942, 946 (4th Cir. 1954),

"The prejudice to the defendant which justifies the court in refusing permission to the plaintiff to dismiss is more carefully considered, and is no longer true to say, as was so often said in decisions preceding the Federal Rules, that 'the incidental annoyance of a second litigation upon the subject matter', furnishes no ground for denying the Plaintiff permission to dismiss his complaint."

However, this Court not only must weigh the possible prejudice to the Defendants but must also consider what is fair to the Plaintiff. Thus, if the conditions are not necessary, they should not be required (See 9 Wright and Miller Fed. Pract. and Proc. Section 2364, note 10).

In the instant case, the Plaintiff is impecunious. If she is able to post a bond,



it will have to be with the assistance of others. Moreover, she has expended considerable amounts on costs for transcripts, retainers for her attorneys and other litigation related expenses. On the other hand, the Defendants have not been required to expend any sums of money. Unlike Defendants in the reported cases where the courts have conditioned voluntary settlement on the payment of costs, they have been represented free-of-charge. It is undeniable that the Maryland taxpayer has underwritten some of the cost of the defense of this case. However, this amount in comparison to total State expenditures is minuscule. To require the Plaintiff in this case to post a bond would be grossly unfair. Such a requirement can only create the appearance that justice can only be pursued

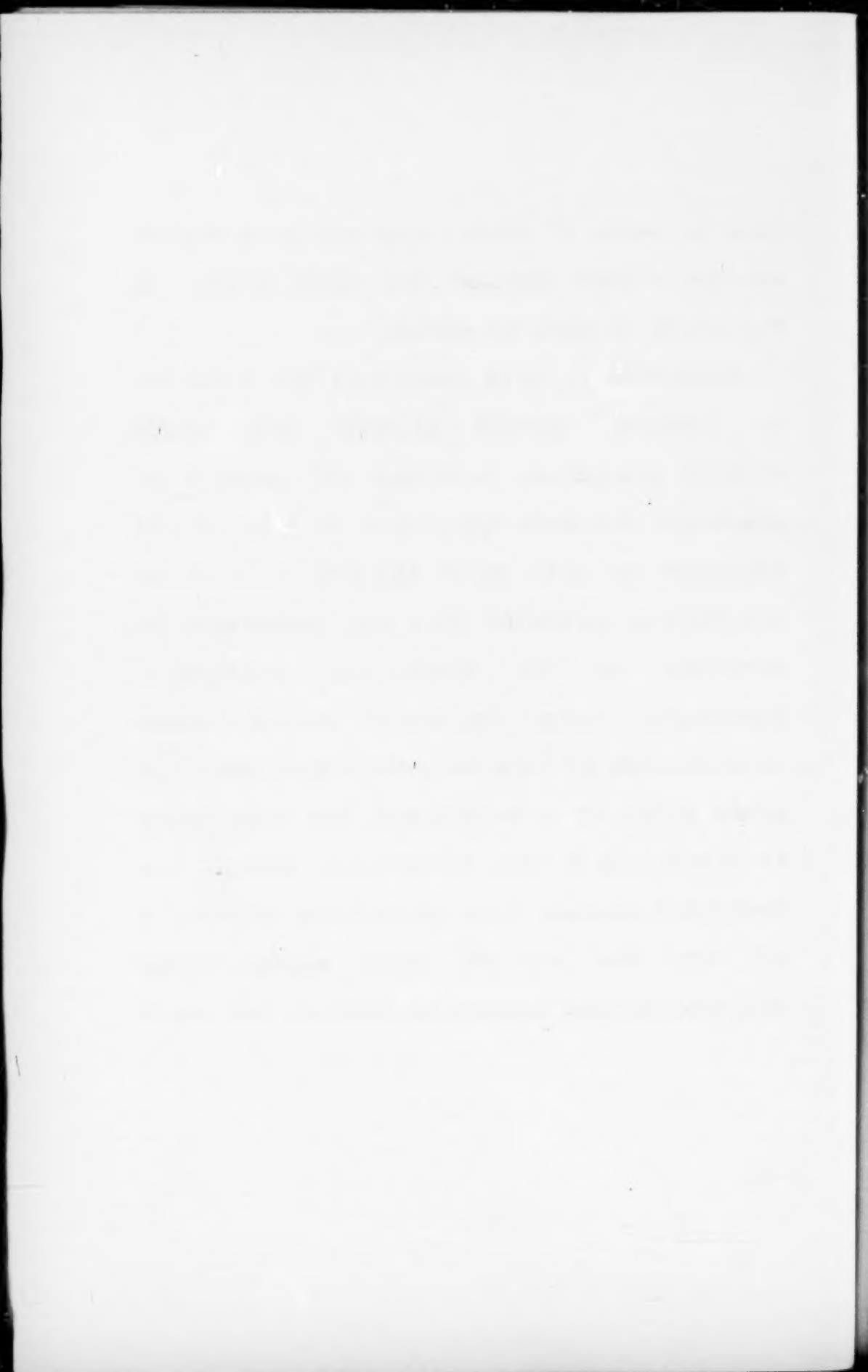


by the rich and able and that a pauper may as well not attempt to resort to justice.

The Plaintiff has made serious allegations, which if proven, would result not only in civil liability but also possible criminal culpability under the federal and state criminal codes. (See e.g. 18 U.S.C. 241, 242) Pursuance of her legitimate claims should not be hampered by causing her to post a bond or pay costs to the State, particularly where the State has the right to proceed against the Plaintiff for the collection of attorneys' fees under 42 U.S.C. 1988 should the Plaintiff be unsuccessful in prosecuting her claims. Moreover, if the Plaintiff is successful and the Defendants persuade this Court that the dismissal herein and the defense of an expanded law suit necessarily prejudiced

them in terms of costs, then any such amount can be offset against any such award the Plaintiff is able to garner.

Accordingly, this Court, in the interest of justice, should dismiss this claim without prejudice, provided all matters of discovery are made applicable to any new and expanded law suit which the Plaintiff files and further provided that the Defendants be entitled to an award of reasonable attorneys' fees including excess costs necessitated by this voluntary dismissal and prosecution of a subsequent law suit under 42 U.S.C. 1988 or, conversely, should the Plaintiff become "the prevailing party", a set off for any of those excess costs incurred by the Defendants against any award



garnered by the Plaintiff.

Respectfully submitted,

s/ Michael E. Marr
Michael E. Marr
MARR, BENNETT & CARMODY, P.A.
Suite 430
10 North Calvert Street
Baltimore, MD 21202
(301) 539-4250
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of February, 1984, copies of the foregoing Plaintiff's Motion for Voluntary Dismissal Without Prejudice by Order of Court and Memorandum in support thereof was hand delivered to Kathleen Howard Meredith, Esquire, Assistant Attorney General, Offices of the Attorney General, Munsey Building, Calvert and Fayette Streets, Baltimore, MD 21202, Attorney for the Defendants.

s/ Michael E. Marr
Michael E. Marr



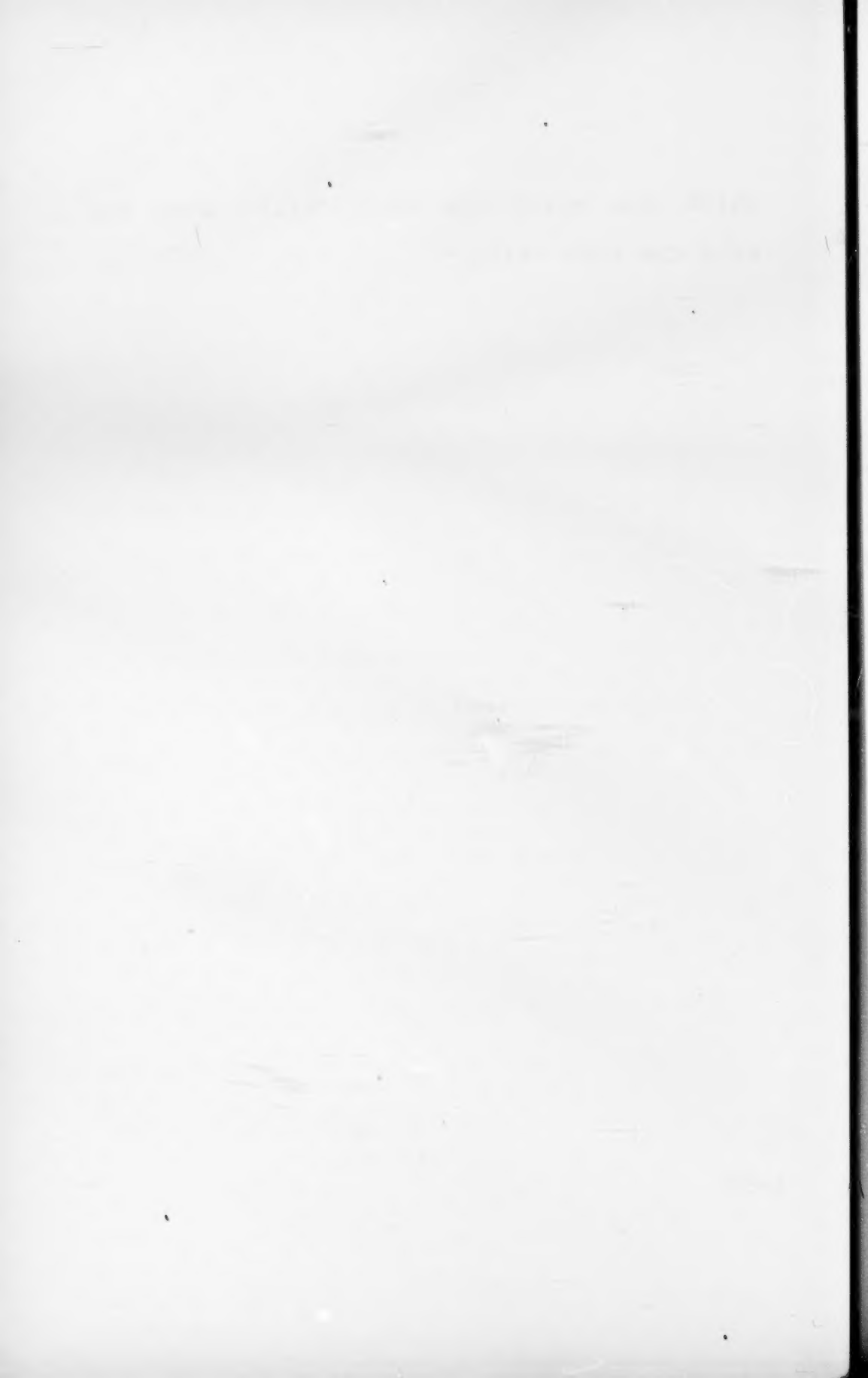
APPENDIX K

[293] MR. MARR: I'm not sure of anything and I'm not saying that. I'm telling you that in my opinion, I would be shocked if in fact there was anything meant other than destroying the efficacy of the individuals concerned, because I have had discussions with her along those lines and I've indicated to her -- I had a great deal of difficulty in persuading her to take these examinations and my approach to her was, Please take them, let's see what they come up with, we will then have our own battery of psychiatrists who we hope, if they come up with something adverse, will be able to destroy them.

Now, I didn't mean that literally killing and I don't think -- that's why I don't



think she meant the word "kill" when she
said the word "kill."



APPENDIX L

[669]

THE COURT: Now, let's get back to this business of you being a witness.

MR. MARR: I think we have resolved that, Your Honor.

THE COURT: What is it?

MR. MARR: We're going to enter into a stipulation that will resolve the matter.

THE COURT: What is the stipulation?

MR. MARR: That in fact Dr. Kayzakian did not say, Il faut tuer, whatever it is, to me in a telephone conversation with me.

MS. MEREDITH: We're going to have to work on the stipulation, Your Honor, but there's no claim that that's what happened.

THE COURT: Where did Mr. Marr -- where did you get the idea, Mr. Marr, that is what happened?



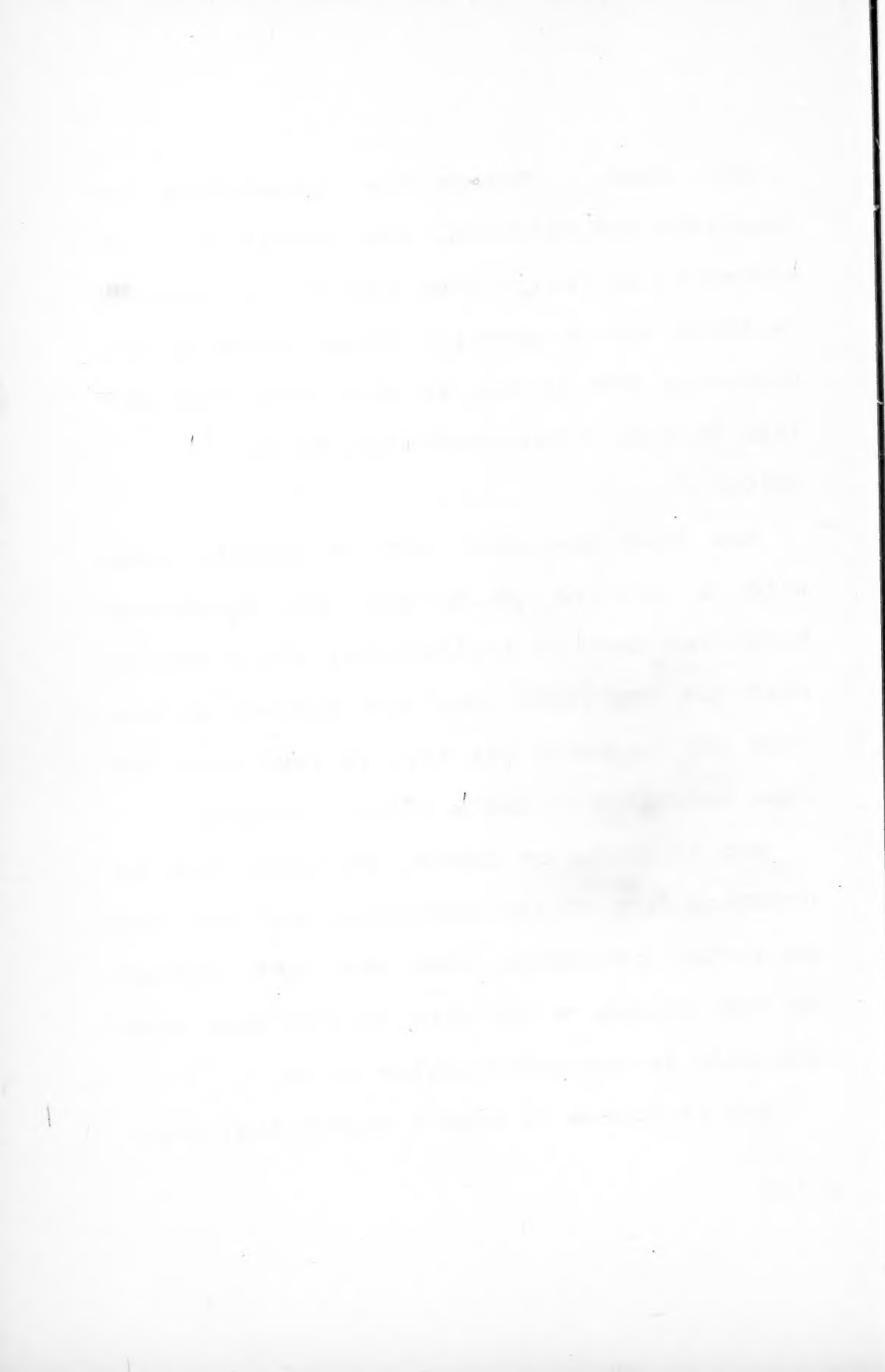
MR. MARR: During the depositions of Henderson and Harrison, they testified -- it seemed to me recall them testifying that she -- there was a question about xeroxing the protocols and it was at that time that she left to make a telephone call to me.

[670]

And then she went into a private room with a private phone and Dr. Henderson testified that he accidentally hit a button that put her words over the speaker in his room and he heard her say, Il faut tuer les deux medecines -- cette fille l'advocat.

And it looks as though, at least from my understanding of the testimony, and this got me rather concerned, that she went, picked up the telephone to call me and that this was said in the conversation to me.

And of course it didn't happen that way.



THE COURT: Of course, she could have made two telephone calls or --

MR. MARR: She could have made eight of them, but her testimony is going to be that during that break, she only made one and it was to me, and of course that makes the jury think I might have heard it.

THE COURT: I think you can -- it seems to me, Ms. Meredith, there is not very much difficulty in working on the stipulation.

The stipulation can be that there is no stipulation as to how many calls Dr. Kayzakian made or did not make but that it is stipulated that if she made a call to Mr. Marr, she did not tell Mr. Marr -- did not make that comment to Mr. Marr and that the state totally concurs -- that Mr. Marr has so stated and the state totally agrees-- accepts that. [671] Is that --

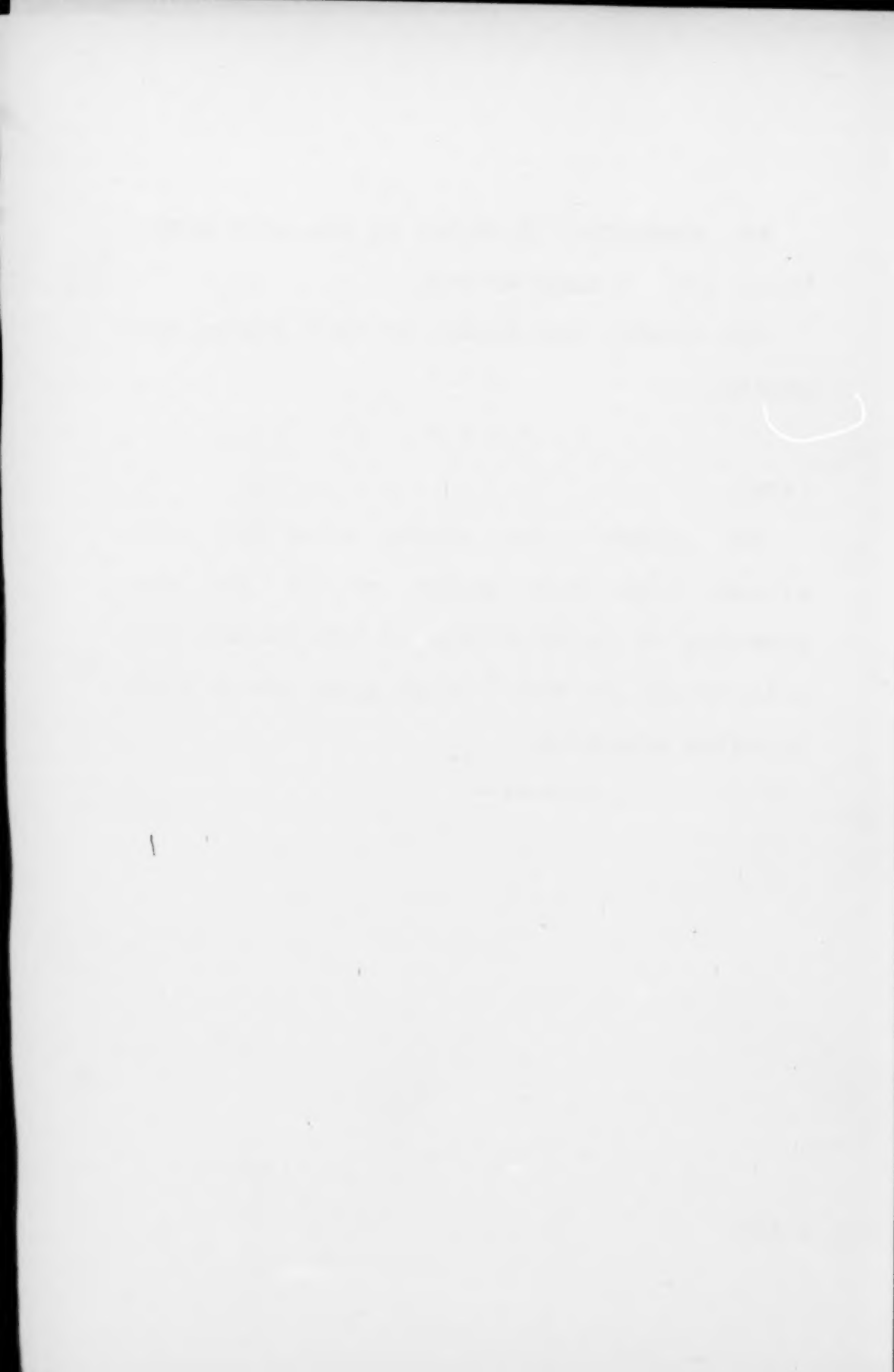
MS. MEREDITH: I think we can work something out. I know we can.

THE COURT: All right, so that flurry has passed.

* * * *

[638]

THE COURT: All right, then you will either drop this point or if you are pressing it or objecting to the ruling, you will brief it and I will give you a fast briefing schedule.



APPENDIX M

[582]

THE COURT: All right, Ms. Meredith and Mr. Marr.

I wrote a Memorandum and Order on January 26th and under that there were to be things submitted today which have not been submitted once again.

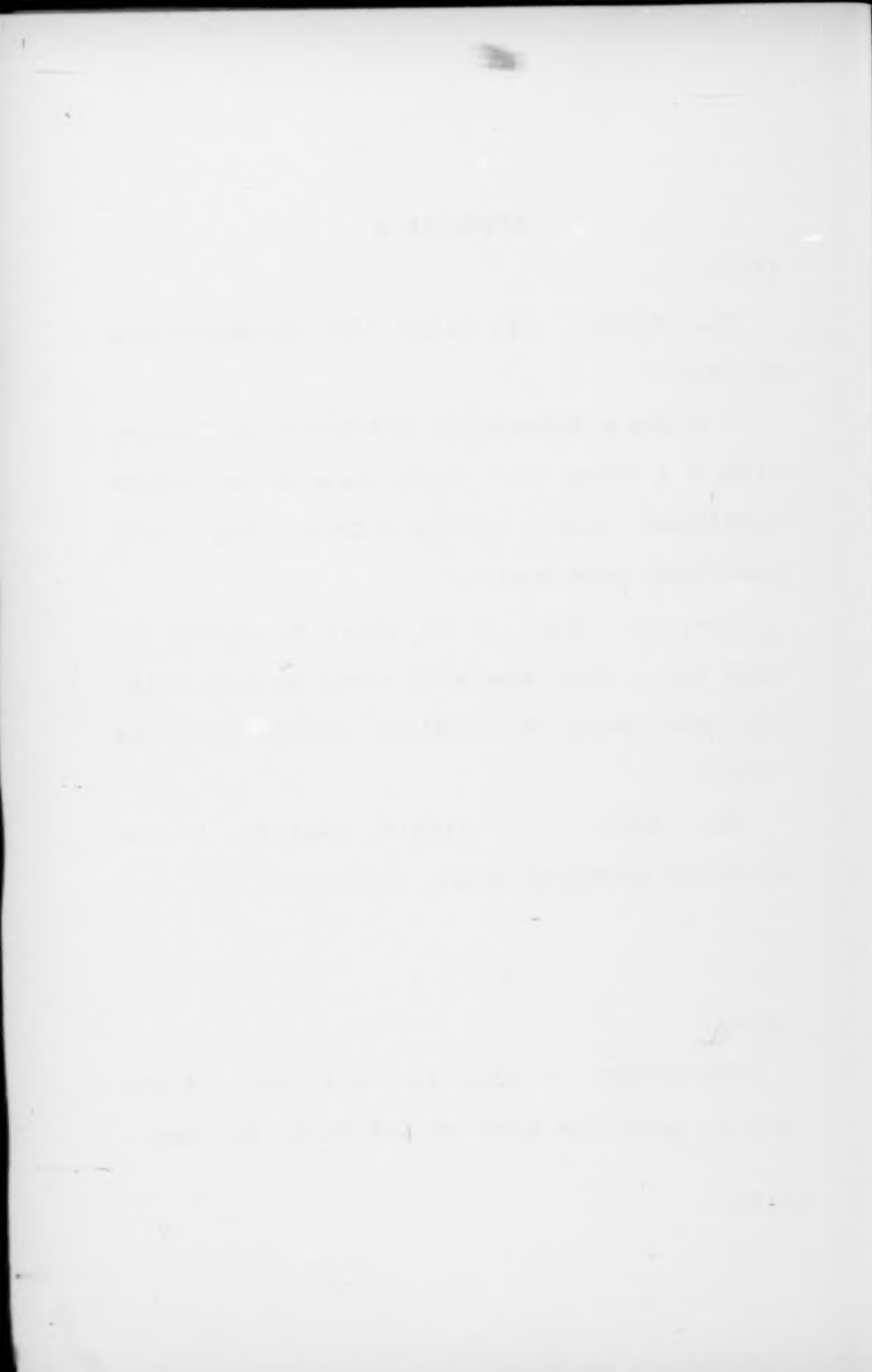
Now, Mr. Marr, I am about to throw the case out. Now, how many times do you think you are going to violate orders of this Court?

MR. MARR: I didn't realize I had violated anything Judge, honestly.

* * * *

[589]

THE COURT: -- that is one thing. If you try to pull the kind of end runs, Mr. Marr,



that you have become famous in my mind at least for pulling, you are not only going to not be allowed to do it but I will just dismiss the case and invite your client to sue you.

No. 86-643

2

Supreme Court, U.S.
FILED

NOV 20 1986

JOSEPH F. SPANOL, JR.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

SOUGHIK ('SONIA') KAYZAKIAN,
Petitioner,

v.

THOMAS F. KRAJEWSKI, ETC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

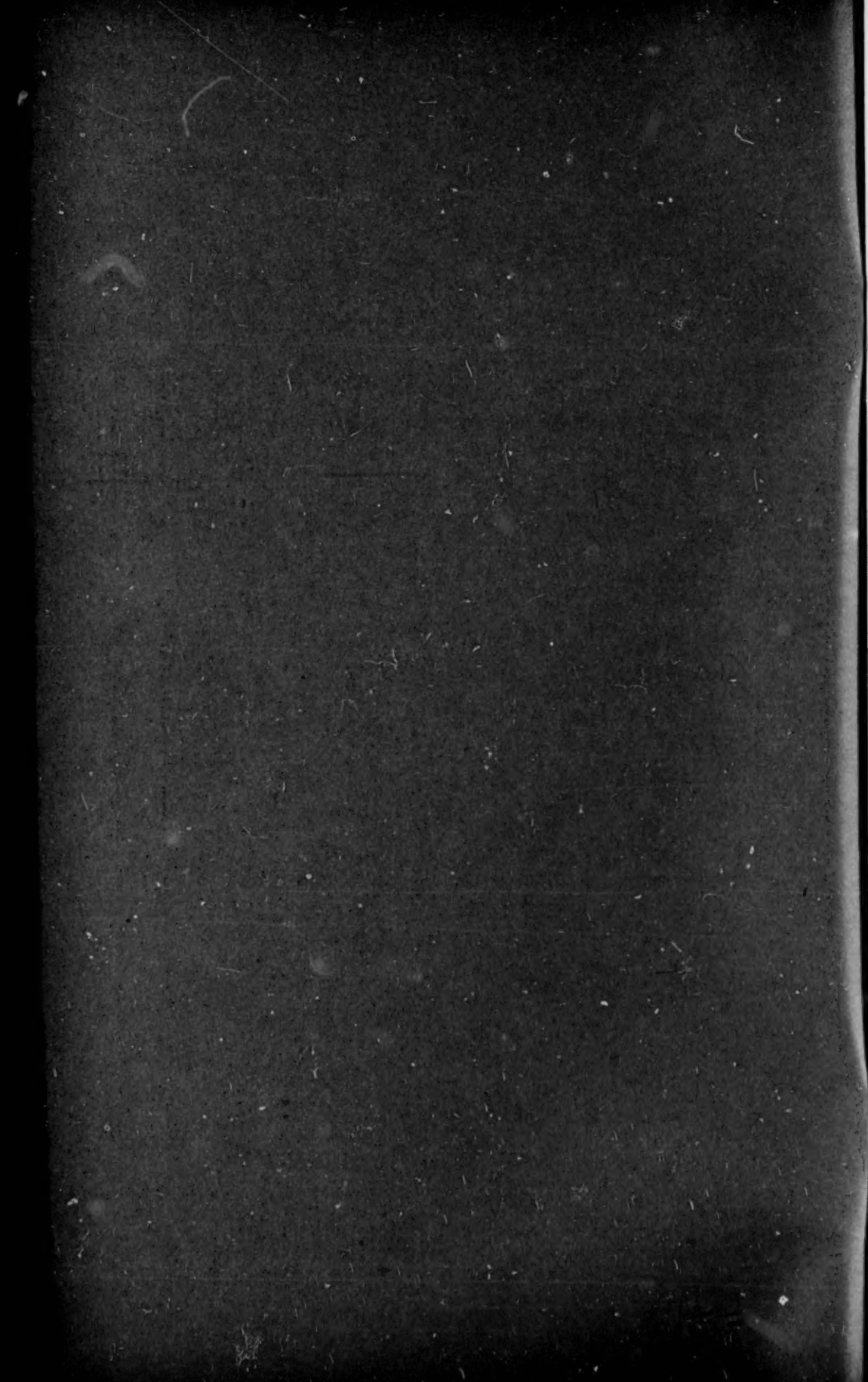
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Attorneys for Respondents.

33/100



QUESTION PRESENTED FOR REVIEW

Did the court below properly hold that the district court's dismissal with prejudice of Petitioner's action, pursuant to F. R. Civ. P. 41, was an appropriate exercise of discretion where Petitioner utterly failed to comply with the terms and conditions established by the court for the acceptance of a dismissal without prejudice?

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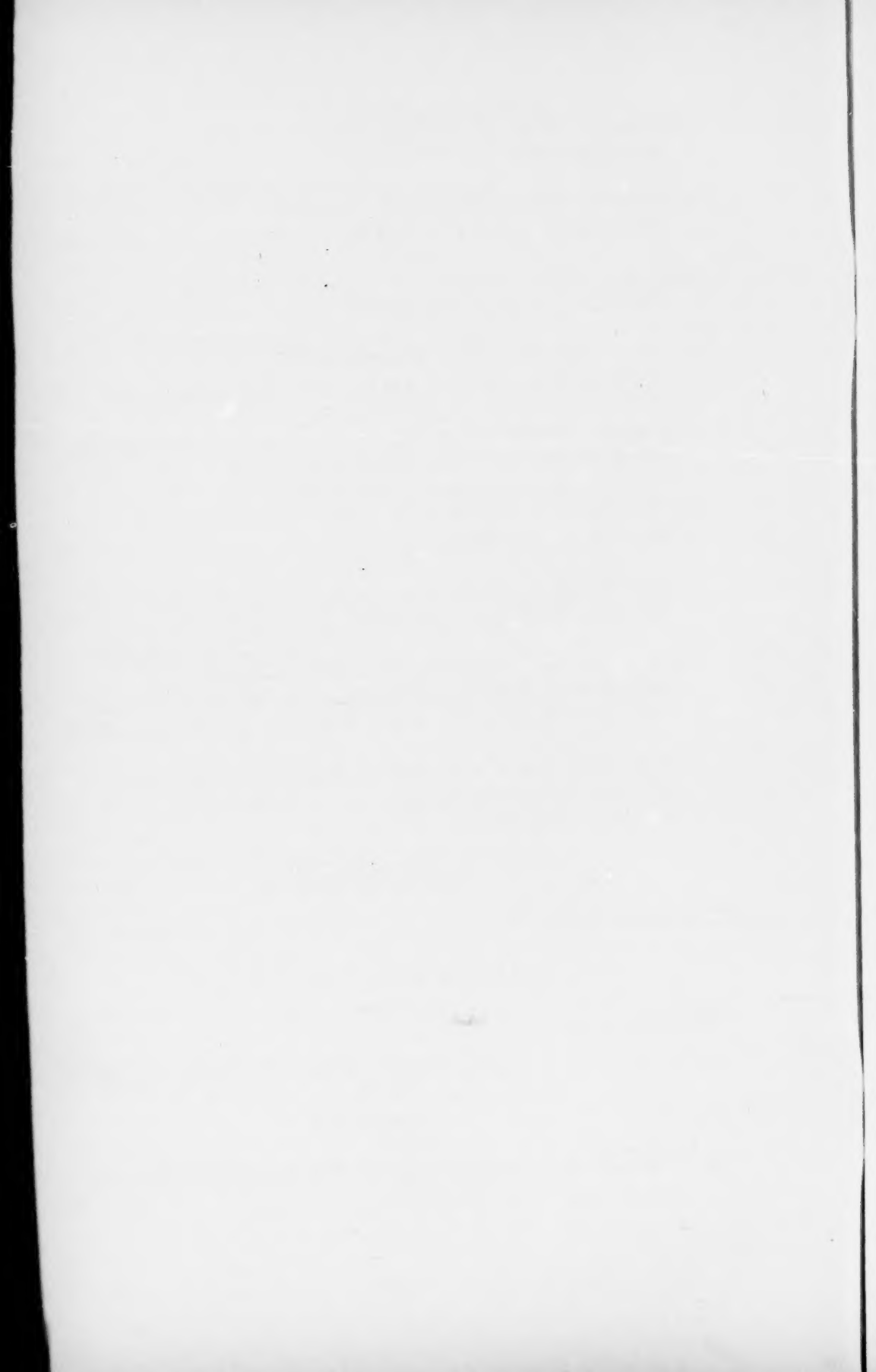
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9 C. Wright & A. Miller, <u>Federal Practice and Procedure</u> §2366 (1971 and 1986 Supp.)	9
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No. 86-643

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

SOUGHIK ('SONIA') KAYZAKIAN,

Petitioner,

v.

THOMAS F. KRAJEWSKI, etc., et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

STATEMENT OF THE CASE

Petitioner filed a complaint in the United States District Court for the District of Maryland on October 27, 1982. An amendment to the complaint was filed on November 29,

1982. Petitioner claimed that various employees of the Springfield Hospital Center and the Maryland Mental Hygiene Administration violated Petitioner's constitutional rights by reprisals against her for her having reported alleged medical neglect of two patients.

During the course of the litigation, the parties engaged in extensive and continuous discovery, including numerous depositions, interrogatories, and document requests. In a telephone conference with the court on October 17, 1983, subsequent to both the scheduled close of discovery and Respondents' filing of a motion for summary judgment, Petitioner's counsel for the first time disclosed an intention to amend the complaint again. Petitioner wished to add allegations that she had engaged in protected speech with respect to patients other than the two mentioned in her original complaint.

However, no written motion to amend was ever filed with the court.

In December, 1983, approximately one month before the scheduled trial date of January 3, 1984, Petitioner's counsel again disclosed an intention to amend the complaint and to introduce evidence concerning patients other than the two referred to in Petitioner's original complaint. After observing that no formal motion to amend had been filed, the court indicated it would not permit such an amendment. (Apx. a-23-24).

On January 20, 1984, the district court granted Respondents' motion in limine to exclude evidence concerning the alleged mistreatment of patients other than the two referred to in Petitioner's original complaint, explaining that discovery had concluded and that Petitioner had been aware of the excluded evidence in advance of the conclusion of discovery. (Supp. Apx. 1-4)

(See also Apx. a-63).^{1/}

On February 21, 1984, only three working days before the rescheduled trial date, Petitioner orally sought leave to dismiss her action without prejudice. Two days later, she submitted a written motion pursuant to Rule 41(a)(2). Petitioner's primary purpose in requesting dismissal of her suit was to avoid the court's pretrial rulings precluding her from enlarging the scope of the lawsuit beyond that which had been the basis for the extensive discovery which had occurred. (Apx. a-55).

Recognizing that a last-minute unconditional dismissal without prejudice would be unfairly prejudicial to the

^{1/}Supp. Apx. refers to the Appendix attached to this Brief in Opposition.

Respondents, the court offered Petitioner three options. The first was to proceed with the scheduled trial. The second was to dismiss without prejudice, under such terms and conditions, if any, as would alleviate the injury which a dismissal without terms and conditions would cause Respondents. The court noted that, at a minimum, an appropriate remedial condition would be a cash payment or bond in an amount compensating defendants for those fees and expenses that would not have been incurred had the Petitioner's proposed broader lawsuit been filed initially. The third option was to dismiss with prejudice. (Apx. a-70-77 and a-12-20).

Following discussions with her attorney, Petitioner rejected the first option and expressed interest in the second. (Apx. a-72-77). Both Petitioner and her counsel were aware that an inability to comply with the

court's ultimate terms and conditions could result in a "with prejudice" dismissal. Two days later, on February 23, 1984, the court issued a Memorandum and Order recounting the events that transpired at the February 21 hearing. (Apx. a-12-20). Therein, the court ordered Petitioner to inform the court in writing, on or before March 12, 1984, whether she was able to post a bond "to reimburse defendants for such costs and expenses, if any, as defendants may incur because of the need for repetitive work and proceedings in the new case which would not have occurred had plaintiff proceeded timely in the within case." (Apx. a-16). The failure to comply with this requirement, the court stated, would likely result in a prompt dismissal with prejudice. (Apx. a-18).

Neither Petitioner nor her counsel ever responded to the court's February 23 directive. Consequently, on March 13, 1984,

Respondents' counsel requested the court to dismiss Petitioner's action with prejudice. One week later, on March 20, 1984, by virtue of an unpublished Order, this action was dismissed with prejudice because of "(a) plaintiff's failure to supply the requested information as to bonding, and (b) the entire record in this case and for the reasons previously stated on the record, orally and in writing, by this Court." (Apx. a-22).

Petitioner then appealed to the United States Court of Appeals for the Fourth Circuit. In an unpublished opinion, that court affirmed the decision of the district court, concluding that Petitioner had failed to comply with the conditions set by the lower court and finding that the court's judgment was an appropriate exercise of discretion. The present Petition followed.

REASONS FOR DENYING THE WRIT

Further review of this case is plainly unwarranted. The Petition presents neither a substantial federal question, nor any novel or unsettled issue upon which the federal courts require guidance from this Court. The decision of the district court represents a proper exercise of the discretion granted under the Federal Rules of Civil Procedure. The court of appeals, therefore, correctly found no abuse of discretion.

I. The District Court Properly Dismissed Petitioner's Action With Prejudice.

F.R. Civ. P. 41(a)(2) expressly grants a court authority to impose terms and conditions upon the dismissal of an action. It is well established that such terms and conditions may include the payment of costs and expenses that the dismissal will cause defendants to incur. Yoffe v. Keller Industries, Inc.,

580 F.2d 126, 131, reh'g denied, 582 F.2d 982 (5th Cir. 1978), cert. denied, 440 U.S. 915 (1979); Home Owners' Loan Corp. v. Huffman, 134 F.2d 314 (8th Cir. 1943); 9 C. Wright & A. Miller, Federal Practice and Procedure §2366 (1971 and 1986 Supp.). Similarly, it is well settled that a dismissal with prejudice is appropriate where a plaintiff fails to meet the terms and conditions set by the court. Yoffe, supra; Davis v. McLaughlin, 326 F.2d 881, 883-84 (9th Cir.), cert. denied, 379 U.S. 883 (1964); Stern v. Inter-Mountain Telephone Co., 226 F.2d 409, 410 (6th Cir. 1955); De Filippis v. Chrysler Sales Corp., 116 F.2d 375 (2d Cir. 1940); cf. Costello v. United States, 365 U.S. 265 (1961) (construing F. R. Civ. P. 41(b)).

Within several days of the scheduled commencement of the trial in this action, Petitioner sought to dismiss her lawsuit

without prejudice in order to file a second suit containing additional allegations arising out of the same general claim upon which her original suit was based. The terms and conditions imposed by the court were appropriate for the protection of the legitimate interests of the Respondents. Moreover, the court correctly presented Petitioner with the option to proceed to trial if the terms and conditions were viewed by her as too onerous. See Yoffe, 580 F.2d at 131.

Petitioner elected to avoid trial and then utterly failed to comply with the court's requirement that she report by March 12, 1984, on her efforts to obtain a bond for Respondents' protection. That failure to report served as the basis for the district court's dismissal. (Apx. a-21-22). Therefore, it was Petitioner's failure to communicate with the trial

court, notwithstanding its order, rather than her failure to post the bond, which caused the dismissal with prejudice. By failing to report to the court as required regarding her efforts to obtain a bond, Petitioner waived her right to complain further regarding the amount of the bond. Accordingly, the issue of whether the requirement of a bond was too onerous was not before the court of appeals and is not properly before this Court.

The trial court's decision to dismiss Petitioner's lawsuit with prejudice was a legitimate, indeed essential, exercise of discretion. That exercise of discretion has been reviewed and found appropriate by the court of appeals. Further review here is plainly unwarranted.

II. The District Court Properly
Refused to Permit Petitioner
to Expand Her Lawsuit in an
Untimely Manner.

Petitioner complains that the district court improperly denied her counsel's request for leave to amend her first amended complaint. The court of appeals correctly found it unnecessary to address the merits of this issue. At no time did Petitioner ever file a motion for leave to amend that specified the particular changes envisioned. On several occasions following the expiration of discovery and the filing of defendants' motion for summary judgment, Petitioner's counsel did indicate a desire to add new defendants and new allegations concerning the alleged mistreatment of patients other than the two identified in her original complaint. However, even assuming that Petitioner properly preserved this issue for appellate review, the court below

correctly refused to overturn the district court's action.^{2/}

The district court found that Petitioner was aware of the allegations sought to be included in an amended complaint well in advance of her counsel's first oral indication of a desire to

^{2/}A trial court's denial of a request to amend a pleading may be reversed only for an abuse of discretion. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, reh'g denied, 401 U.S. 1015 (1971); Murphy v. White Hen Pantry Co., 691 F.2d 350 (7th Cir. 1982); Roberts v. Arizona Board of Regents, 661 F.2d 796 (9th Cir. 1981). Although leave to amend, when properly requested, should be freely given, where the plaintiff has been guilty of undue delay or where there is prejudice to defendants, the trial courts possesses the discretion to refuse an amendment. Zenith, *supra*; Foman v. Davis, 371 U.S. 178 (1962); Svoboda v. Trane Company, 655 F.2d 898, 900 (8th Cir. 1981). Thus, circuit courts have frequently refused to find an abuse of discretion where, as here, a plaintiff attempts to amend a complaint subsequent to the conclusion of discovery. Roberts, *supra*; Svoboda, *supra*; Addington v. Farmer's Elevator Mutual Insurance Co., 650 F.2d 663, 666 (5th Cir.), cert. denied, 454 U.S. 1098 (1981).

amend. (Supp. Apx. 1-4). The attendant prejudice to Respondents which would have been occasioned by Petitioner's untimely amendment was readily apparent to the trial court. The introduction of new defendants and of allegations concerning numerous other patients would have required extensive and costly investigation and potentially massive amounts of rebuttal evidence pertaining to treatment decisions for each patient. Under the circumstances, it cannot be said that the district court abused its discretion.

III. The District Court Judge Was Correct Both In Refusing To Disqualify Himself And In Establishing The Conditions For The Mental Examination Of Petitioner.

Petitioner raises two additional claims, neither of which the court of appeals found worthy of mention.

First, Petitioner claims the district court judge erred in failing to disqualify himself pursuant to 28 U.S.C. §455. Simply put, however, she does not demonstrate that a reasonable person, knowing all of the facts, would believe that the court was not impartial. United States v. Story, 716 F.2d 1088 (6th Cir. 1983). Significantly, at the February 21, 1984 hearing, Petitioner's own counsel advised the court that Petitioner had filed her motion to disqualify, pro se, because counsel was unable to file such a motion in good faith. (Supp. Apx. 5-7). Furthermore, counsel admitted that he had not seen any evidence of favoritism toward the Office of the Attorney General as claimed by Petitioner. (Supp. Apx. 8-9).^{3/}

Second, Petitioner asserts that the trial judge erred in refusing to permit Petitioner's counsel to be present at

Petitioner's mental examination and that he erred in refusing to permit Petitioner to monitor her own tape recorder during the examination. The terms and conditions of a mental examination pursuant to F. R. Civ. P. 35 are within the discretion of the trial judge. Sanden v. Mayo Clinic, 495 F.2d 221 (8th Cir. 1974). Petitioner

^{3/}That the trial judge was familiar with one of Respondents' expert witnesses is not a factor requiring disqualification. See e.g., Plechner v. Widener College, Inc., 569 F.2d 1250, 1262-63 (3rd Cir. 1977). Petitioner's strained attempt to suggest a connection between the dismissal of her lawsuit and the court's consideration of the expert's statements regarding certain threats allegedly made by Petitioner cannot withstand even minimal scrutiny. The controversy over the expert's remarks ultimately played no part in the court's decision to dismiss the action. The terms and conditions which Petitioner failed to meet were imposed only because she requested an eleventh hour dismissal after extensive discovery and trial preparation. The facts upon which the judge based his ultimate dismissal were clearly acquired from his participation in the case and not from some impermissible extra-judicial source. See United States v. Grinnell, 384 U.S. 563 (1966).

cannot demonstrate any legal entitlement to the terms and conditions she requested, nor can she demonstrate that the trial judge's action was an abuse of discretion. Brandenberg v. El Al Israel Airlines, 79 F.R.D. 543 (S.D.N.Y. 1978) (counsel for party not entitled to be present at a mental examination). In any event, such issues are not worthy of review here.

CONCLUSION

Petitioner seeks yet another review of the factual predicate for the discretion exercised by the district court in dismissing this action. That exercise of discretion has already been found appropriate by the court of appeals. The Petition presents no substantial federal question which merits further review. Defendants respectfully request,

therefore, that the Petition for Writ of
Certiorari be denied.

Respectfully submitted,

STEPHEN H. SACHS
Attorney General of Maryland

C. FREDERICK RYLAND
Assistant Attorney General
Counsel of Record

DAVID E. BELLER
Assistant Attorney General

SUPPLEMENTAL
APPENDIX



[563]

THE COURT: Okay.

Now, with regard to the next point, defendants seek to exclude evidence concerning Springfield patients other than Finkelstein and Frank.

Now, there, this goes to Mr. Marr's attempt to amend the pleadings to show generally bad conditions at Springfield and I said on December 9, 1983 and December 12, 1983 that plaintiff could not amend and I ruled that way and therefore the motion in limine as to the evidence in this category is granted.

There are not going to be any more amendments. When you came into the case, Mr. Marr, I gave you liberal opportunity following in the footsteps of other counsel and you are not going to amend again.

It is not fair. Discovery, extensive discovery has been held, it has been

concluded and this case is reaching trial and it is not going to go off again because new avenues are opened, with all of the opportunities that plaintiff has had up to now to say what -- to allege what plaintiff wanted to allege.

MR. MARR: Excuse me, Judge.

THE COURT: Now, I have covered -- what?

MR. MARR: I just wanted to point out that I had given the names in discovery of those people, Your Honor.

THE COURT: What?

[564]

MR. MARR: I just wanted to point out for the Court's benefit that the names of those people were given during the course of discovery in connection with supplemental answers.

THE COURT: Not for the first time.

MR. MARR: No, no, I understand that, but --

THE COURT: The plaintiff knew about these other patients before, did she not?

MR. MARR: Yes, Your Honor, she did --

THE COURT: All right.

MR. MARR: -- but --

THE COURT: That is her problem.

MR. MARR: Your Honor, if the Court please, I really caused her to reflect and to think of the names. She had no way of giving the names.

THE COURT: That is --

MR. MARR: She knew there were others.

THE COURT: That is up to counsel to have done long before in terms of allegations. You do not wait till you get this far along.

MR. MARR: I agree, Your Honor. I'm not saying that it's an allegation now in this case. I'm not seeking to amend. I just --

THE COURT: The fact that this came about through discovery is not something that

helps you. If something [565] new comes up in discovery that plaintiff did not know of could not reasonably anticipate, that is one thing. Where a plaintiff is alleging that she got cancer as a result of being exposed to conditions in a plant and new evidence comes along about new causes of cancer based on new behavior that plaintiff did not know about, that is one thing, or did not have reason to believe would be important.

But plaintiff knew about these patients other than Finkelstein or Frank. She did not make those points earlier. They were not made in the original pleading complaint, they were not made in an amended complaint, and they are not coming in now.

Now, we will move on.

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[674]

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There was another matter, however, that Mr. Marr mentioned and he said that his client would be filing today [675] a motion for disqualification of judge due to bias or prejudice.

Ms. Kayzakian filed that in proper person today and it was received in this court today.

Have you seen a copy of it, Ms. Meredith?

MS. MEREDITH: Just now, Your Honor, I did and I read it.

THE COURT: You have a copy?

MS. MEREDITH: Yes, Your Honor, I have.

THE COURT: All right.

Mr. Marr, do you want to be heard on that motion before I comment on it, or before I hear from Ms. Meredith?

MR. MARR: Well, Your Honor, I'm glad the Court brought that up because my client wants that matter disposed of before anything else is done --

THE COURT: It will be disposed of --

MR. MARR: -- with reference to this case.

THE COURT: -- first because in view of that motion, I will not do anything in this case until that motion is disposed of.

MR. MARR: Your Honor, I would like to explain to the Court why I didn't file the motion and why it was done pro se. I think the Court is entitled to that explanation.

I indicated to my client that I felt that it would be inappropriate to make this motion. My client initially [676] wanted me to make the motion. There was a discussion to -- for me to certify that it would be made in good faith under 28 U.S.C. 144 and I felt then that it would not be proper for me to do

that, not that I was questioning her good faith but I felt that it was inappropriate for her to file the motion under 144 and furthermore felt that it was inappropriate to file the motion under 455, which is what Dr. Kayzakian has chosen to do.

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THE COURT: Have you seen anything in this case at all, Mr. Marr, that would indicate to you that the Court has favored Ms. Meredith as an individual or favored the office of the Attorney General?

MR. MARR: No, Your Honor.

THE COURT: As a matter of fact, I have been quite critical at times of Ms. Meredith in this case. At the start of the case, I told Ms. Sykes and Ms. Meredith that I was not going to have the kind of holding back of information that they started off with with your predecessors, Mr. Marr.

There have been some other suggestions. I think the other day I suggested to Ms. Meredith that she was being too hard-nosed, did I not?

MR. MARR: You did, Your Honor.

THE COURT: That was long before I heard
any news of this.

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